CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 146

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, PETITIONER,

vs.

MRS. EDNA K. YATES

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR CERTIORARI FILED JUNE 30, 1936.

CERTIORARI GRANTED OCTOBER 12, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, PETITIONER,

vs.

MRS. EDNA K. YATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

INDEX

	Original	Print
Proceedings in Court of Appeals of Georgia	1	1
Notice of petition for certiorari	1	1
Record from City Court of Carrollton	2	1
Bill of exceptions and order thereon	2	1
Petition	5	4
Answer	9	8
Amendment to declaration	15	14
Exhibit "A"—Insurance Policy	15	14
Application for insurance	18	16
Amendments to answer	22	20
Amendments to answer	26	24
Verdict	27	25
Judgment	28	26
Motion for new trial and order thereon	28	26
Amendment to motion for new trial and order thereon	30	28

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 24, 1936.

—7916-C

	Original	Print
Proceedings in Court of Appeals of Georgia—Continued.		
Record from City Court of Carrollton—Continued.		
Brief of evidence	43	41
Testimony of Edna K. Yates	43	41
Dr. Chester L. Davidson	49	48
Edna K. Yates (recalled)	52	50
Offers in evidence	52	51
Stipulation re payment of premiums	53	52
Defendants exhibits:		
No. 2—Claimant's statement	54	52
No. 3—Attending physician's statement	55	52
No. 4—Physician's certificate	56	52
No. 5—Section 58 of New York Insurance Law	57	53
No. 6—Decision of Court of Appeals of New York, Case of Minsker vs. John Hancock Insurance Co.	57	53
No. 7—Decision of Court of Appeals of New York, Case of Traveler's Insurance Co. vs. Pomerantz	59	55
Order approving brief of evidence	60	56
Order overruling amended motion for new trial	60	56
Opinion, Sutton, J.	61	57
Judgment	68	63
Order denying motion for rehearing	69	64
Proceedings in Supreme Court of Georgia	70	64
Petition for writ of certiorari	70	64
Order granting certiorari	80	74
Opinion, Russell, J.	81	74
Dissenting opinion, Gilbert, J.	91	82
Judgment	106	94
Recital as to motion for rehearing	107	94
Order denying motion for rehearing	108	94
Motion for order staying mandate	109	95
Petition for stay of execution of judgment of City Court	110	95
Order staying execution of judgment, etc.	111	96
Bond on stay (omitted in printing)	112	
Præcipe for transcript of record	117	97
Notice of præcipe	119	99
Præcipe for additional portions of record	120	100
Testimony of Frederick C. Tanner	121	101
Dr. John F. Denton	122	102
C. F. Engle	123	103
Plaintiff's exhibit No. 2—Letter, Chelsea Tire Corp. to Herman Sulzer, June 23, 1932	125	104
Clerk's certificate (omitted in printing)	126	
Order allowing certiorari		105

[fol. 1]

IN COURT OF APPEALS OF GEORGIA

Number 24,220

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

MRS. EDNA K. YATES, Defendant in Error

NOTICE OF PETITION FOR CERTIORARI—Filed March 4, 1935

To the Honorable Logan Bleckley, Clerk of Said Court:

Now comes the John Hancock Mutual Life Insurance Company, plaintiff in error in the above stated case, and gives notice to you of its intention to apply to the Supreme Court of Georgia for a writ of certiorari to review the decision of the Court of Appeals, affirming the decision of the trial court.

It is requested that you prepare a certified copy of the entire record in the above stated case in the Court of Appeals, including the judgment and opinion of the said court, to be furnished with the application for writ of certiorari.

This 4th day of March, 1935.

Smith, Smith & Bloodworth, Boykin & Boykin, Attorneys for John Hancock Mutual Life Insurance Company, Plaintiff in Error.

[File endorsement omitted.]

[fol. 2] IN CITY COURT OF CARROLLTON

Number 162

MRS. EDNA K. YATES

vs.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

BILL OF EXCEPTIONS—Filed May 30, 1934

Be it remembered that on the 13th day of March, 1934, at the regular March Term, 1934, of the City Court of Car-

rollton, before the Honorable J. J. Reese, Judge presiding, with a jury there came on to be tried the case of Mrs. Edna K. Yates against the John Hancock Mutual Life Insurance Company, the same being an action to recover upon a policy of life insurance issued by the defendant company upon the life of Harmon Harlin Yates. Said suit was filed on the 29th day of November, 1932.

Evidence was introduced for plaintiff and defendant, and after argument of counsel, and the charge of the court, the jury returned a verdict in favor of the plaintiff in the principal sum of $2,000, and in addition thereto the sum of $500 penalty, and $250 as attorneys' fees, and judgment was duly entered thereon, all this appearing in the record.

The defendant thereafter in regular course and within the time prescribed by law, filed its motion for a new trial, and perfected said motion by filing a brief of the evidence duly approved by the court and the charge of the court duly certified. The defendant also filed an amendment to its original motion for a new trial, the grounds of which amendment to said motion were approved as true and correct by the trial judge, with the exception of grounds seven and eight of said amended motion which were not approved by the trial judge for the reason that before the hearing upon said motion, counsel for plaintiff voluntarily wrote off from said verdict and judgment the amount of $500.00 as damages and the amount of $250.00 as attorneys' fees. Said motion for new trial as amended came on for hearing before the court on the 7th day of May, 1934, and on the 8th day of May, 1934, the said motion for new trial as amended was by the court overruled on each and every ground [fol. 3] therein stated. The case thus illegally terminated.

To this judgment of the court overruling its said motion for a new trial the defendant excepted, and now excepts, and assigns error thereon as being contrary to law, and says that the court erred in overruling said motion for new trial as amended on each and all of the grounds therein stated. The defendant specifies the following portions of the record in said case as material to a clear understanding of the errors in this bill of exceptions, to wit:

1. The original petition in said case filed on the 29th day of November, 1932.

2. The original plea and answer of the defendant filed on the 16th day of January, 1933.

3. The plaintiff's amendment to the original petition, together with exhibit attached thereto, filed on the 21st day of January, 1933, together with the order of the court thereon allowing same.

4. Amended answer of the defendant filed on the 14th day of March, 1934, together with the order of the court thereon allowing same.

5. The amended answer of the defendant filed on the 14th day of March, 1934, together with the order of the court thereon allowing same.

6. The verdict of the jury rendered in said case on the 14th day of March, 1934.

7. The judgment of the court on said verdict dated the 15th day of March, 1934.

8. The motion for new trial filed by defendant on the 14th day of March, 1934, with rule nisi and service thereon.

9. The amendment of defendant to the original motion for new trial filed May 11th, 1934, together with the order of the court approving the recital of facts contained therein as true and correct.

10. The brief of evidence filed May 11th, 1934, together with exhibits attached thereto and together with order of the court approving the same as true and correct.

11. The charge of the court with the approval of the judge thereon dated May 7th, 1934.

12. The order and judgment of the court overruling defendant's motion for new trial as amended, dated May 8th, 1934.

[fol. 4] 13. The entries of filing of each and all of the parts of the record above specified to be entered and transmitted in the proper order.

And now, within the time provided by law comes John Hancock Mutual Life Insurance Company, plaintiff in error and assigning error on all of the rulings complained of as being contrary to law, tenders this its bill of exceptions and prays that the same may be certified to as provided by law, and transmitted to the Court of Appeals of

the State of Georgia in order that the alleged errors may be considered and corrected.

Smith, Smith & Bloodworth, Boykin & Boykin, Attorneys for John Hancock Mutual Life Insurance Company, Plaintiff in Error.

509-11 Grant Building, Atlanta, Georgia.

I do certify that the foregoing bill of exceptions is true and contains and specifies all of the evidence, and specifies all of the records material to a clear understanding of the errors complained of; and the clerk of the city court of Carrollton is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such and cause the same to be transmitted to the present term of the Court of Appeals of the State of Georgia, that the errors alleged to have been committed may be considered and corrected.

This 30 day of May, 1934.

J. J. Reese, Judge, City Court of Carrollton.

Due and legal service of the within bill of exceptions acknowledged; copy and all other or further notice or service waived.

This 30 day of May, 1934.

Smith & Millican, Attorneys for Mrs. Edna K. Yates, Defendant in Error.

[fol. 5] Clerk's certificate to foregoing paper omitted in printing.

[File endorsements omitted.]

IN CITY COURT OF CARROLLTON

PETITION—Filed November 29, 1932

To the City Court of Carrollton, said County:

The petition of Mrs. Edna K. Yates shows to the court the following facts:

1. That John Hancock Mutual Life Insurance Company is a non-resident corporation, and is hereinafter called the defendant.

2. That said defendant is indebted to the petitioner in the sum of Two Thousand Dollars ($2,000.00) principal and Five Hundred Dollars ($500.00) as damages, and the sum of Two Hundred Fifty Dollars as attorney's fees, by reason of the facts hereinafter set out.

[fol. 6] 3. That said defendant on the 12th day of May, 1932, issued a life insurance policy upon the life of her husband, Harman H. Yates, for the sum of Two Thousand Dollars ($2,000.00) in which the petitioner is the beneficiary, said policy being No. 2166887, amounting to Two Thousand Dollars ($2,000.00), issued on the 12th day of May, 1932, and issued on the regular policy form of The John Hancock Mutual Life Insurance Company of Boston, Mass., in the sum of Two Thousand Dollars ($2,000.00) with an annual premium of $54.26, with a disability premium of $2.88, and accidental death benefit premium of $2.56, payable on the 12th day of May, 1932, and that said premiums were paid by the said Harman H. Yates, and the policy delivered to him.

4. Petitioner further shows that the said Harman H. Yates died on the 23rd day of June, 1932, and that said policy was then due and payable to the petitioner as the beneficiary.

5. Petitioner further shows that proof of loss was filed on the death of the said Harman H. Yates, and that said defendant refused to pay said claim, or any part thereof.

6. Petitioner further shows that said defendant, without any cause, for more than sixty days after proof of loss was filed, failed and refused to pay said claim or any part thereof, and she alleges that on account of their conduct in said matter she is entitled to receive the sum of 25 per cent. of the amount due under said policy as damages, and also a reasonable attorney's fees in said matter, which she alleges $250.00 would be a reasonable amount as attorney's fees for prosecuting said claim.

7. Petitioner further shows that she made demand on said defendant to pay said claim under said policy, and that the defendant failed and refused to pay same.

8. Petitioner further shows that in order to enforce collection of said claim, she did on the 10th day of November,

1932, sue out before the Hon. E. H. Rainwater, N. P. and Ex Officio J. P., an attachment for the sum of Two Thousand Seven Hundred Fifty Dollars ($2,750.00) returnable to the December Term, 1932, of the city court of Carrollton, which attachment was by W. A. Garrett, Deputy Sheriff, levied on the following property as property of the defendant, to wit:

[fol. 7] GEORGIA,
Carroll County:

By virtue of the within attachment I have this day levied on and seized the following property, to wit:

86 acres more or less, of lot of land No. 181 in the 10th district of said State and County, to wit: Beginning at the southeast corner of said lot and run north along original line 118 rods to J. H. Bean's south line; thence west along it 130 rods to Crumbley's northeast corner; thence south along Crumbley's east line 85 rods to a rock corner; thence east 37 rods and 3½ feet to a rock corner; thence south 33 rods to original south line of said lot; thence east along it 93 rods to starting point.

Also, 20 acres more or less, in the southwest corner of lot of land No. 182 as follows: Begin at southwest corner of said lot and run north along original line 118 rods to J. H. Bean's southeast corner; thence east 26 rods to rock corner at Crumbley's line; thence south along it 116 rods to original south line of said lot; thence west along it 26 rods to starting point, all being in the 10th district of said state and county, and being in the aggregate 106 acres more or less.

Levied on as the property of John Hancock Mutual Life Insurance Company, a non-resident corporation, and C. W. Williams; tenant in possession notified personally and the defendant in attachment notified by registered mail. Both notices given in writing.

Also levied on the following described property by virtue of within attachment, to wit:

136.66 acres, more or less, of lot of land No. 164 in the 11th district of said county and state, as follows: Begin at the southeast corner of said lot and run northeasterly along the east line thereof 25.12 chains; thence south 88 degrees west 5.07 chains; thence north 3 degrees west 8.25 chains; thence south 88 degrees west 4.82 chains to branch; thence

northeasterly along said branch 12.5 chains, more or less, to north line of said lot; thence south 88 degrees and 30′ west 21.31 chains; thence south 3 degrees east 10.12 chains; thence south 89 degrees and 30′ west 4.72 chains; thence south 1 degree and 25′ east 35.10 chains, more or less, to south line of said lot; thence north 88 degrees and 15′ east [fol. 8] 31.19 chains to south east corner of said lot.

Also, 6.75 acres, more or less, of lot of land No. 157 in said 11th district, as follows: Begin at southeast corner and run north 88 degrees and 15′ west 7.25 chains to settlement road; thence northwesterly along said road 20.17 chains to its intersection with west line of said lot; thence southwestwardly along said west line 18.62 chains to southwest corner of said lot.

Also, 66.69 acres, more or less of lot of land No. 157 in said district as follows: Begin at west line of said lot at a point 18.76 chains south of the northwest corner of said lot and run northward 88 degrees east 12.31 chains; thence north 1 degree and 30′ west 6.50 chains; thence north 88 degrees west 18 chains to Turkey Creek; thence northwestwardly down said creek 6.50 chains; then north 88 degrees east 13 chains to east line of said lot; then south 1 degree and 30′ east 23.14 chains; then south 88 degrees and 30′ west 33 chains; then north 1 degree and 45′ west 4.25 chains; then south 85 degrees and 15′ west 7.25 chains to west line of said lot; thence north 1 degree and 30′ west 7 chains to starting point. The last three described tracts lying in a body and containing 204.10 acres, more or less.

Levied on as the property of John Hancock Mutual Life Insurance Company, a non-resident corporation, and notified Sam Robinson, tenant, in possession, personally and mailed registered notice to defendant in attachment. Written notice to tenant in possession and to defendant in attachment.

This the 10th day of November, 1932.

W. A. Garrett, Deputy Sheriff, Carroll County, Ga.

Recorded Nov. 16th, 1932. A. W. Alexander, C. C. C.

A copy of said levy is hereto attached marked Exhibit "A" and made a part of this petition.

Wherefore, your petitioner prays for judgment for her said claim in the sum of Two Thousand Dollars ($2,000.00) principal, Five Hundred Dollars ($500.00) as damages and

Two Hundred Fifty Dollars ($250.00) as attorney's fees and for the sale of the above described property and that [fol. 9] the proceeds of same be applied to the payment and satisfaction of said debt.

Smith & Millican, Attorneys for Petitioner.

[File endorsement omitted.]

In City Court of Carrollton

[Title omitted]

Answer—Filed January 16, 1933

Now comes the defendant in the above stated case and without waiving its demurrers, but insisting on same, for plea and answer to plaintiff's petition says:

1. Defendant admits paragraph one (1) of plaintiff's petition.

2. Defendant denies paragraphs two (2) and six (6) of plaintiff's petition.

3. Answering paragraph three (3) of plaintiff's petition, defendant avers that on the 12th day of May, 1932, it issued its policy of life insurance number 2166887, in the amount of $2,000.00, on the life of Harmon H. Yates, Edna K. Yates, wife, being named as beneficiary, said policy being granted in consideration of a written application made therefor by the said insured, a copy of which application was attached to the said policy, and the said policy and the application therefor, attached thereto, constituted the entire contract between the parties. The original of said policy of insurance was delivered to the said insured and should be in the custody, possession or control of plaintiff, and defendant demands strict proof thereof. Defendant denies the accuracy of plaintiff's conclusions in reference to said policy, as contained in said paragraph three (3).

4. Answering paragraph four (4) of plaintiff's petition, defendant admits that it has been advised that the said insured died on the 23rd day of June, 1932. Defendant [fol. 10] denies, however, that its said policy was then due and payable to the plaintiff as the beneficiary, and defend-

ant denies that it is now indebted to the plaintiff in any sum except for a return of premiums which will be hereinafter more fully set forth.

5. Answering paragraph five (5) of plaintiff's petition, defendant avers that it has received from the plaintiff two documents—first, known as Certificate No. 1, Claimant's statement, purporting to be an affidavit by the plaintiff, dated June 23, 1932; and the second, being designated as Certificate No. 2, Attending Physician's Statement, and purporting to be an affidavit by J. G. Schmidt, House Surgeon, of New York Hospital, New York City, dated June 23, 1932. Defendant avers that following the receipt of these documents from the plaintiff and upon consideration thereof, the defendant took the position that it was and is not liable to the plaintiff in any sum under its said policy of life insurance, except for the return of the premium paid, in the sum of $15.80, tender of which has been made to the plaintiff and by her refused. Except as herein otherwise answered, the allegations of said paragraph are denied.

6. Answering paragraph seven (7) of plaintiff's petition, defendant avers that subsequent to the receipt by the defendant of the documents referred to in answer to paragraph five (5) of plaintiff's petition, the plaintiff made demand on the defendant for payment of the face of the policy of insurance sued upon, and defendant has refused payment and denies any and all liability whatsoever to the plaintiff, except for the return of the premium, as aforesaid. Except as herein otherwise answered, the allegations of said paragraph are denied.

7. Answering paragraph eight (8) of plaintiff's petition, defendant admits that an attachment was sued out by the plaintiff as therein alleged, and was levied on property as therein described. Defendant in making this plea and answer to plaintiff's petition, makes a general appearance in the case and submits to the jurisdiction of the court over it in this suit.

8. For further plea and answer, defendant avers that the policy of insurance sued upon, provides, among other things, as follows:

[fol. 11] "This insurance is granted in consideration of the application herefor, a copy of which is attached hereto,

and made a part of this contract, and of the payment of the annual premium of $54.26. * * * This policy and the application herefor constitute the entire contract between the parties, and all statements made by the insured or on his behalf, shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall be used in defense to a claim hereunder, unless it is contained in a written application herefor, and a copy of such application attached to this policy when issued. No modification or alteration of this policy or endorsement hereon, will be valid unless made by the President, a Vice-President, the Secretary, or an Assistant Secretary, and no other person is authorized to modify or waive any of the terms and conditions of this policy, nor to extend the time for payment of premiums or other monies due the Company, or to bind the Company by making any promise or by accepting any representation or information not contained in the application for this policy."

The application above referred to, copy of which is attached to and made a part of the policy sued on, is dated May 2, 1932, and signed by Harmon Harlin Yates. Said application provides, among other things, as follows:

"It is understood and agreed: A. That the foregoing statements and answers which I have made in this application as a basis for the contract of insurance, are *complete*, true and correctly recorded. B. That if payment of the premium has been made with the application, the insurance (subject to the terms and conditions of any policy issued hereunder) if the application is approved at the Home Office of the Company, shall be in force from the date of the completion of the application, provided, that the Company shall be satisfied that on said date I was insurable in accordance with its rules for the amount and on the plan applied for, without modification; that if payment of the premium has not been made with the application, any policy which may be issued hereon shall take effect only if I have had no medical treatment since the date of the application, and then only in the event that it shall be delivered to and actually received by me, and the first premium or install-
[fol. 12] ment thereof actually paid while I am alive and in sound health, and that whether the premium is paid with the application or otherwise, delivery and payment shall

constitute an acceptance of the policy and of all its conditions."

Said application as to the payment and amount of the premium reads in part as follows:

"17. Premiums to be paid quarterly. Total amount of premiums—$15.76.

18. Have you paid the premium? No. Amount paid—None."

In consideration of the aforesaid written and signed application, the policy sued on was issued, dated May 12, 1932, and the initial premium of $15.80 was paid by the said insured to the defendant Company on May 27, 1932.

On or about May 28, 1932, the insured was admitted to the New York Hospital, where the insured died on June 23, 1932, the cause of death being carcinoma (or sarcoma) of the intestines.

9. In the said written application signed by the insured, as aforesaid, the following question was propounded and answer given by the insured, to wit:

"26. Are you now in good health, so far as you know or believe? A. Yes."

10. Defendant avers that the above and foregoing representation of fact by the said insured was material to the risk and defendant avers that said representation was false and untrue, for that on the date of said application, viz., May 2, 1932, the said insured was not in sound health and knew he was not in sound health for that on or about April 7, 1932, and at various and sundry times, both before and after said date, the said insured had called on Dr. C. L. Davidson of Jamaica, Long Island, for professional medical treatment and advice, as to the insured's physical condition, the general health and physical condition of the insured having begun to fail appreciably in March, 1932. The said Dr. C. L. Davidson diagnozed the insured's physical condition as being secondary anemia. Defendant avers that in truth and in fact on the date of the said written application the insured was suffering from cancer of the intestines, and knew or believed that his health was not good at that time. Defendant avers that the foregoing

facts constitute such material misrepresentations of facts, [fol. 13] as that the nature, extent and character of the risk was changed, and defendant avers that it is not liable to the plaintiff under said policy and said policy is void and of no effect.

11. Defendant avers further that in the said written application signed by the said insured, the following question was propounded and answer given by the insured, to wit:

"35. Have you within the past five years had medical advice for any disease or disorder not included above? Give full particulars." To which question the insured answered "no."

Defendant avers that the diseases or disorders referred to above in said question are embodied in question number 34, the insured answering "No" as to each named disease. Defendant avers that the above and foregoing representation of fact by the insured was material to the risk and the defendant avers that said representation was false and untrue, for that during the month of April, 1932, and particularly on or about April 7, 1932, the insured called on Dr. C. L. Davidson, of Jamaica, Long Island, for professional medical treatment and advise as to the insured's physical condition. The said Dr. Davidson diagnosed the insured's physical ailment as secondary anemia, which ailment or disease is not listed in question 34 in the written application. Defendant avers that by virtue of the foregoing question and answer, the insured concealed from this defendant the fact of his treatment at the hands of Dr. Davidson shortly prior to the making of the application for this insurance. Defendant avers that the foregoing facts constitute such material misrepresentation and concealment of facts as that the nature, extent and character of the risk was changed by reason of which defendant avers that it is not liable to the plaintiff under its said policy, and said policy is void.

12. Defendant avers that at the time of the delivery of the policy of insurance sued on and the payment of the first premium or installment thereof, the insured was not in sound health for that on said date, to wit: May 27, 1932, the insured was suffering from carcinoma (or sarcoma) of

the intestines, which disease is commonly known as cancer [fol. 14] of the intestines, which is considered a fatal and incurable disease. On the day immediately following the payment of the first premium, to wit: on May 28, 1932, the insured's physical condition and health was in such state as that the insured sought and obtained admittance to the New York Hospital for treatment, where he died, as above stated, on June 23, 1932. Defendant avers that the foregoing facts constitute such a material misrepresentation and concealment of the truth from this defendant as that the nature, extent and character of the risk was changed by reason of which defendant is not liable under its said policy and same is void.

13. Defendant further avers that upon the ascertainment by it of the false and material representations of fact hereinbefore set out, it denied liability to the plaintiff under its said policy, and before suit was filed thereon, tendered to the plaintiff herein, the beneficiary named under said policy, the sum of $15.80, being the premium paid on said policy by the said insured, which tender was refused. Defendant now tenders the said sum of $15.80, representing the premium paid on said policy, to the plaintiff herein and herewith pays into court, for the benefit of said plaintiff, the said sum, and defendant avers that it is not liable to the plaintiff under said policy for any other or further or additional amount.

Wherefore, defendant avers that it is not liable to the plaintiff under and by virtue of the terms of the policy sued on, except for the return of the premium paid, as hereinabove more fully set forth, which premium, having heretofore been tendered and being now paid into court, defendant prays that it be hence discharged with its reasonable costs.

And of this defendant puts itself upon the Country.

Smith, Smith & Bloodworth, Defendant's Attorneys.

[File endorsement omitted.]

[fol. 15] IN CITY COURT OF CARROLLTON

[Title omitted]

AMENDMENT TO DECLARATION

Now comes the plaintiff in the above stated cause and by leave of the court amends her declaration as follows:

1. She amends said declaration by adding at the end of paragraph 3 the following. She attaches hereto a copy of said policy and marks same exhibit "A" and makes the same a part of her declaration and reference thereto is prayed.

Wherefore plaintiff prays that this amendment be allowed and that she have judgment in the amount claimed.

Smith & Millican, Attorneys for Plaintiff.

The foregoing amendment allowed, this the 21st day of January, 1933.

J. J. Reese, J. C. C. C.

EXHIBIT "A" TO AMENDMENT

No. 2166887. Amount $2000.

The John Hancock Mutual Life Insurance Company of Boston, Massachusetts, hereby insures the life of Harmon H. Yates and agrees to pay Two Thousand Dollars, the sum insured, less any indebtedness to the Company hereon and less any unpaid balance of premium for the uncompleted policy year, upon due proof of the death of the insured while the policy is in full force and upon its surrender at the Company's Home Office in Boston, subject to the conditions and provisions hereinafter recited, to Edna K. Yates, wife, if living, or to such other beneficiary as may be finally substituted under the conditions hereof, or if no such beneficiary be then living, payment will be made to the executors or administrators of the insured; or-

[fol. 16] The Company will pay the said sum as an Endowment to the Insured if living at the end of the policy year nearest to age eighty-five, if at that time the policy is in full force, upon due surrender of the policy at its Home Office in Boston, less any indebtedness and subject to the conditions and provisions as hereinafter recited.

This insurance is granted in consideration of the application herefor, a copy of which is attached hereto, and made a part of this contract, and of the payment of the annual premium of Fifty-Four and 26/100 Dollars and of the payment of a like premium on or before the twelfth day of May in each succeeding year until the premium for forty-seven full years have been paid or until the prior death of the Insured.

Policy and Application the Entire Contract

This policy and the application herefor constitute the entire contract between the parties, and all statements made by the Insured or on his behalf shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall be used in defense of a claim hereunder unless it is contained in a written application herefor, and a copy of such application attached to this policy when issued. No modification or alteration of this policy or endorsement hereon will be valid unless made by the President, a Vice-President, the Secretary, or an Assistant Secretary, and no other person is authorized to modify or waive any of the terms and conditions of this policy, nor to extend the time for payment of premiums or other moneys due the Company, or to bind the Company by making any promise or by accepting any representation or information not contained in the application for this policy.

Incontestability

This policy shall be incontestable after it has been in force during the lifetime of the Insured for two years from its date of issue, except for non-payment of premium and except as to provisions and conditions relating to benefits in the event of total and permanent disability and those granting additional insurance specifically against death by accident; but in case the age has been misstated, the amount payable hereunder shall be that which the premium paid would have purchased at the correct age. If the in- [fol. 17] sured shall die during the first two years of this policy by his own hand or act, while sane or insane, the liability of the Company shall be limited to the premiums paid hereon.

The Conditions and Provisions hereinafter set forth are hereby made a part of this contract.

In witness whereof, the John Hancock Mutual Life Insurance Company has, by its President and Secretary, executed and delivered this contract and caused the same to be duly countersigned, at Boston, Massachusetts, on the twelfth day of May, A. D. 1932, which is the date of the issue of this policy.

Walter L. Crocker, President. Charles J. Diman, Secretary.

Countersigned P. N. Erskine, Policy Registrar.

[fol. 18] Application for Insurance to the John Hancock Mutual Life Insurance Company of Boston, Massachusetts

N. Y. Form 1101-0-30.

Statement to Be Made by Applicant 2166887

1. Full name of applicant—Harmon Harlin Yates.

2. Address for premium notice—8782 166th St. Jamaica, N. Y.
Residence—8008 171st St. Jamaica, N. Y.

3. Place of birth—Bowdon, Ga.

4. What is your present occupation? State exact duties. Manager Chelsea Tire Corp.

5. Name and Address of Employer? Chelsea Tire Corp. 8782 166 St. Jamaica, N. Y.

6. Have you ever taken, or do you contemplate taking aerial flights either as pilot or passenger? If so give full particulars on aviation question-aire. No.

7. Do you intend to reside or travel outside the United States or Canada? If so, state for how long, when, where, and for what purpose. No.

8. Have you ever applied for a policy which has not been issued or upon which additional premium charge had been imposed by modification of form or otherwise? No.

9. Is any application for insurance now pending in any company? Name of Company, Amount, Plan. No.

10. Is this insurance intended to replace other insurance now in force in this or any other company? If so, name company and give particulars. No.

11. Insurance on my life. Amount. Year issued. Name of Company. None.

12. Form of policy applied for. Endowment Age 85.

13. Amount. $2,000.00.

14. Date of birth, month, day, year, age next birthday? April 20, 1894, 39 years.

15 & 16. Do you desire Total and Permanent Disability Benefit with waiver of premium and income payments? No, or with waiver of premium only. Yes.

[fol. 19] 17. Premium to be paid Quarterly. Total amount of premium $15.76.

18. Have you paid the premium? No. The amount paid? None.

19. Dividend to be applied under Option B.

20. State whether married, single, widow, widower. Married.

21. Non-forfeiture provisions to become effective in event of non-payment of premiums. Reduced paid-up insurance.

22. Name of Beneficiary. Edna K. Yates.

23. Relationship to applicant. Wife.

24. Do you reserve the right to change the beneficiary from time to time? Yes.

25. State total amount of disability income payable each month in connection with all insurance now carried. None. If health insurance is carried aside from accident insurance state total amounts of benefits payable monthly. None. Corrections and amendments (for home office only). Ques. 17 prem. $15.80.

26. Are you now in good health, so far as you know? Yes.

27. Have you any deformity, impairment of sight or hearing, or loss of limb? No.

28. Have you within six months lived with or been intimately associated with any person suffering from consumption? No.

29. Have you ever applied for or are you now receiving any invalid pension, Government disability or vocational training? No.

30. A. Have albumin, blood or sugar ever been found in your urine? No.

B. Have you ever been told that you have symptoms of Brights disease or diabetes? No.

31. To what extent do you use spirituous or malt liquor? None.

B. Have you ever used either of them to excess? No.

32. Have you ever received or applied for treatment at any hospital, dispensary, sanitarium, cure or other institution? No.

33. Have you ever been away on account of your health? Give full particulars. No.

34. Have you ever been treated for any of the following? Answer yes or no to each. If yes give full particulars in space below.

[fol. 20] Epilepsy, No.
Insanity, No.
Paralysis, No.
Dizziness, No.
Nervous breakdown, No.
Frequent or severe headaches, No.
Discharge from the ear, No.
Goiter, No.
Rheumatism, No.
Cancer or tumor, No.
Asthma, No.
Chronic cough, No.
Blood spitting, No.
Details of illness recorded above. None.
Consumption, No.
Pleurisy, No.
Indigestion, No.
Appendicitis, No.
Ulcer of stomach or duodenum, No.
Gall stones, No.
Kidney stones or gravel, No.
Kidney disease, No.
Disease of bladder or prostrate, No.
Rectal trouble, No.
High blood pressure, No.
Varicose veins or ulcer, No.
Syphilis, No.
Any heart trouble, No.
Any surgical operation, No.

(Statement made by the applicant continued.)

35. Have you within the past five years had medical advice for any disease or disorder not included above? Give full particulars. No.

36. Exact height—5 ft. 10 in. (in shoes).
Accurate weight—148 pounds (ordinary clothes).
When were you last weighed? 4/26/32.
Have you gained or lost weight in the past two years? If so, state cause, how much and how long weight has remained stationary. No. Same weight for last nine years.

37. Family Record:

	Age if living	Condition of heart
Father	62	good
Mother	62	good
How many brothers, 3	36, 30,25	good
How many sisters, 2	33, 28	good
Age Death —		

It is understood and agreed:

A. That the foregoing statements and answers which I [fol. 21] have made in this application as a basis for the contract of insurance, are complete, true and correctly recorded.

B. That if payment of the premium has been made with the application, the insurance (subject to the terms and conditions of my policy issued hereunder) if the application is approved at the Home Office of the Company, shall be in force from the date of the completion of the application, provided, that if the payment of the premium has not been made with the application, any policy which may be issued hereon shall take effect only if I have no medical treatment since the date of the application and then only in the event it shall be delivered to and actually received by me, and the first premium or installment thereof actually paid while I am alive and in sound health, and that whether the premium is paid with the application or otherwise, delivery and payment shall constitute an acceptance of the policy and of all its conditions.

C. That if I shall die during the first two policy years by my own hand or act while sane or insane, the Company shall be liable only for the amount of the premium paid on the policy.

D. That if errors or omissions are discovered by the Company in the application, the Company is authorized to amend the application by noting the change in the space

above entitled "Corrections and Amendments" and I hereby agree that my acceptance of my contract issued on the application so amended shall constitute a ratification by me of such amendments, but no change shall be made as to amount, classification, plan of insurance, or benefits, unless agreed to in writing by me.

Written at Jamaica, N. Y., May 2, 1932.

Harmon Harlin Yates.

Witness: F. G. Schickler.

[fol. 22] IN CITY COURT OF CARROLLTON

[Title omitted]

AMENDMENTS TO ANSWER—Filed March 14, 1934

Now comes the defendant in the above stated case and with leave of the Court amends its plea and answer heretofore filed by adding thereto the following paragraphs:

1. Defendant avers that the policy of insurance sued on in this case was applied for, executed and delivered, within the State of New York, and defendant avers, therefore, that the determination and enforcement of any rights or liabilities under the said policy of insurance is governed and controlled by the law of the State of New York.

2. Defendant avers that it is provided by statute in the State of New York in Section 58 of the Insurance Law (Laws of 1906, c. 326), as follows:

"Every policy of insurance issued or delivered within the State on or after the first day of January, 1907, by any life insurance corporation doing business within the State, shall contain the entire contract between the parties and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application or other writings, unless the same are endorsed upon or attached to the policy when issued, and all statements purporting to be made by the insured shall, in the absence of fraud, be deemed representations and not warranties. Any waiver of the provisions of this Section shall be void."

Defendant avers that the provisions of the foregoing statute are applicable to the policy of insurance sued on

in this case, which policy contains as a part thereof and constituting a part of the contract between the parties, a true, full, and correct copy of the written application for said policy of insurance, made and signed by the insured.

3. Defendant avers that the Court of Appeals of New York in the case of Minsker vs. John Hancock Mutual Life Insurance Company, 254 N. Y. 333; 173 N. E., 4, held in reference to the above quoted statute, that

"Since the enactment of Section 58, a statement by the insured though incorporated into the policy, will be inter-
[fol. 23] preted as a representation rather than a warranty, at all events in the absence of fraud, and so, even though erroneous, will not vitiate the policy unless material to the risk.

The policy must now contain the entire contract. All applications, statements and agreements, if they are to have effect as a part of the policy, must be physically endorsed thereon or attached thereto, so that the insured when he receives a policy may know all of its terms by reading it or having it read.

Prior to 1907, life insurance companies were not required to attach to their policies a copy of the application, but might embody it in the contract by reference merely. The insured by reading his policy could not ascertain that the medical examiner had incorrectly recorded his answers. Since 1907, the insurer is under a duty to endorse or attach the application if the statements therein contained are to have contractual effect, or even the effect of a collateral representation.

When an insured receives a policy, it is his duty to read it or have it read, and, if an application incorporated therein does not contain correct answers to the questions asked by the medical examiner, it is his duty to have it corrected. In such circumstances, a recovery will no longer be permitted because the medical examiner incorrectly recorded the applicant's answers, or because the insured was unable to read or neglected to read the policy.

The answers to questions 14 and 15 as written and annexed to the policy establish as a matter of law that they are material to the risk. The plaintiff is bound by the answers as written, since the application was physically annexed to the policy of insurance, which he received from the insurer. Being a part of the policy, the statements

in the application had at least the effect of erroneous and material representations under the rule at common law."

The judgment for the defendant was affirmed.

Defendant avers that said question fourteen as quoted from the Minsker case is substantially the same in purpose and effect as question thirty-five in the application attached to the policy of insurance sued on in this case.

Further construing said statute the Court of Appeals of [fol. 24] New York, which is the court of last resort of said State, in the case of Travelers Insurance Company vs. Pomerantz, 246 N. Y. 63, 158 N. E. 21, held as follows:

The insured had answered in his written application that he "was not deformed, that he had had no bodily or mental disease, and that he had received no medical or surgical attention within the past five years, for a bodily or mental disease." The proofs showed that within the past five years he had received medical attention no less than twelve times from five physicians.

In holding that the insured had made a material misrepresentation which precluded recovery on the policy, the Court held as follows:

"The insurer indicated by statement 12 that it wanted to know the facts and that it intended and expected the applicant to speak the truth so that it might acquire information concerning them. Any misrepresentation which defeats or seriously interferes with the exercise of such a right cannot truly be said to be an immaterial one. How can an insurer discover the nature of an applicant's previous illness, subject perhaps to the recurrence and apt to degenerate into a disease, yet bearing no trace at the time of his physical examination for the policy, if he falsely states that he had received no medical attention at all?

"Plaintiff proved its case prima facie to the effect that the misrepresentation was material when it showed that within five years defendant had received medical attention a dozen times, that at least one medical consultation had been held, that digitalis had been prescribed in July, 1920, and that defendant was 'sick' when he received attention. It could not compel him to waive his privilege arising from his relation to his physicians, and force them to disclose the diagnosis and the nature of the treatment. He may insist upon this privilege, but he cannot be heard to claim that no prima facie case has been made out.

He produced no witnesses and gave no evidence concerning vital facts which could be disclosed only by him. As a witness called by plaintiff, he testified in respect to a few formal matters. He neither denied nor explained the untrue statement in his application, and he gave no information concerning the state of his health at the time of his medical attention or on the dates of his application or of his [fol. 25] payment of the first premium. To hold that the proof under such circumstances is less than prima facie would be to condone and encourage misrepresentations, and to impose upon a litigant conditions impossible of fulfillment. Plaintiff proceeded as far as the law allowed and far enough, in the absence of denial, to require a finding of material misrepresentation. All evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted."

Wherefore, defendant prays that this amendment be allowed and filed.

Smith, Smith & Bloodworth, Boykin & Boykin, Defendant's attorneys.

GEORGIA,
Fulton County:

Personally appeared before the undersigned attesting officer, Walter Powell, who being duly sworn, deposes and says that he is General Agent, of the defendant Company, and as such is authorized to make this oath; that the new matter of defense contained in the foregoing amendment was not omitted from the original plea and answer for the purpose of delay, and the amendment is not now offered for delay.

Walter Powell.

Sworn and subscribed to before me this the 13th day of March, 1934. T. J. H. Robertson, Clk. S. C.

Allowed subject to demurrer and ordered filed. This 14 day of March, 1934. Under agreement of counsel that p—3 is withdrawn or cancelled.

J. J. Reese, Judge City Court of Carrollton.

[File endorsement omitted.]

[fol. 26] IN CITY COURT OF CARROLLTON

[Title omitted]

AMENDMENTS TO ANSWER—Filed March 14, 1934

Now comes the defendant in the above stated case, and with leave of the court, further amends its original plea and answer, as follows, to wit:

1. Defendant avers that the written and signed application for the policy of insurance sued upon, executed on May 2, 1932, by said Harmon Harlin Yates, and subscribed by him, contains among other things the following questions propounded to said Harmon Harlin Yates and answered by him, as follows, to wit:

34. "Have you ever had or been treated for any of the following? Answer yes or no to each. If yes give full particulars in space below." Among the following diseases or ailments listed in said question 34 are the following, to wit: "Cancer or tumor," to which said insured answered "No," and "Indigestion," to which said insured answered "no."

a. Defendant avers that said representation by said insured that he had not had cancer or tumor was false and untrue, and defendant alleges that the said insured was afflicted with, and had cancer, carcinoma (or sarcoma), during March, 1932, and prior to the date of said application and policy, which said disease on or about June 23, 1932, caused the death of said insured Harmon Harlin Yates. Defendant avers that said misrepresentation of facts was material to the risk, and on account thereof the nature, extent, and character of the risk was changed, and defendant says that it is not liable on said policy, except to the extent of the premiums paid thereon, which it has paid into court for the use and benefit of plaintiff.

b. Defendant also avers that said representation by said insured, that he had not had indigestion, and had not been treated for indigestion was false and untrue, for that during the month of April, 1932, said insured was, in addition to other diseases, or ailments, treated by Dr. C. L. Davidson, a duly authorized and practicing physician of the City [fol. 27] of New York, N. Y., for indigestion and during

the month of April, 1932, and prior to the date of said application and policy said insured had indigestion. Defendant avers that said misrepresentations of facts was material to the risk, and on account thereof the nature, extent, and character of the risk was changed, and defendant says it is not liable on said policy except to the extent of the premiums paid into court for the use and benefit of the plaintiff.

Wherefore, Defendant prays that the within and foregoing amendment be allowed and ordered filed.

Smith, Smith & Bloodworth, Boykin & Boykin, Defendant's attorneys.

GEORGIA,
Carroll County:

Personally appeared before the undersigned attesting officer, Walter Powell, who on oath deposes and says that he is General Agent of the John Hancock Mutual Life Insurance Company, defendant in the above stated case and is authorized to make oath in its behalf. Deponent further says on oath that the new facts and defenses set out in this amended answer, were not omitted in the original answer for the purpose of delay, and that this amendment is not now filed for delay.

Walter Powell.

Sworn to and subscribed before me this the 13th day of March, 1934. T. J. H. Robertson, Clk. S. C.

The foregoing amendment to defendant's answer is hereby allowed and ordered filed. This March 13, 1934.

J. J. Reese, Judge City Court of Carrollton.

[File endorsement omitted.]

IN CITY COURT OF CARROLLTON

VERDICT

We, the Jury, find for the plaintiff two thousand dollars as principal and Five Hundred Dollars as damages and Two Hundred and Fifty Dollars as attorney's fees.

S. W. Roberts, Foreman.

March 14, 1934.

[fol. 28] IN CITY COURT OF CARROLLTON

GEORGIA,
Carroll County:

MRS. EDNA K. YATES

vs.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

JUDGMENT

The jury having found for plaintiff the sum of $2000.00 principal the sum of $500 as damages and the sum of $250.00 as attorney's fees. It is therefore considered, ordered, and adjudged by the court, that plaintiff Mrs. Edna K. Yates, do have and recover of the defendant John Hancock Life Insurance Company, the sum of $2000.00 principal, the sum of $500.00 as damages, the sum of $250.00 as attys. fees, and the sum of $— as cost of suit.

J. J. Reese, J. C. C. C.

This March 15th, 1934.

IN CITY COURT OF CARROLLTON

[Title omitted]

MOTION FOR NEW TRIAL—Filed March 14, 1934

Now comes the defendant in said cause, John Hancock Mutual Life Ins. Co. at the same term of court at which said verdict was rendered, to wit, the March Term, 1934, and within thirty (30) days after the rendition of said verdict, and being dissatisfied therewith, moves the court to grant him a new trial, upon the following grounds:

1. Because said verdict is contrary to law.

2. Because said verdict is contrary to the evidence.

3. Because said verdict is contrary to the law and the evidence.

4. Because said verdict is contrary to the overwhelming weight of the evidence.

Wherefore, Defendant prays that these, its grounds of motion for a new trial may be approved by the court and a new trial be granted it.

Smith, Smith & Bloodworth, Boykin & Boykin, Attorney- for Movant.

[fol. 29] ORDER

Read and considered. The grounds of the above and foregoing motion for new trial are approved as true and correct. Let the plaintiff show cause before me at the Court House in Carrolíton, Georgia, at 9 o'clock a. m. on the 30th day of March, 1934, or as soon thereafter as a hearing can be had, why the prayers of movant should not be granted and a new trial awarded it.

In the meantime, the verdict in said cause is superseded and movant is given until the final hearing of said motion for new trial within which to make out and have approved a brief of the evidence introduced in said cause, and within which to perfect and have approved its motion for new trial, and movant is allowed — days after said final hearing on said motion for new trial within which to file its approved brief of evidence and amended motion for new trial.

Let this motion and rule nisi issued thereon be served upon the plaintiff or her counsel five (5) days before the date set for a hearing.

This March 14, 1934.

J. J. Reese, Judge, C. C. C.

Service of the above and foregoing motion for new trial and rule nisi and order of the court thereon is hereby acknowledged.

This March 14, 1934.

Willis Smith, Smith & Millican, Atty. for Plaintiff.

[File endorsement omitted.]

[fol. 30] IN CITY COURT OF CARROLLTON

[Title omitted]

AMENDMENT TO ORIGINAL MOTION FOR A NEW TRIAL—Filed May 11, 1934

Now comes John Hancock Mutual Life Insurance Company, Movant in the original motion for a new trial filed in the above stated case, with leave of the Court, and amends its original motion for a new trial, by adding the following grounds, to wit:

Ground 1. Because the following material evidence was illegally admitted by the Court to the Jury, over the objection of movant, to wit:

Mrs. Edna K. Yates, the plaintiff in said case, on direct examination by plaintiff's counsel, was asked the following question:

"Now, did you hear the agent ask your husband if he had had medical advice from any physician in the last five years," to which question the plaintiff, Mrs. Yates, answered "Yes."

Movant objected to said question and answer as soon as and at the time it was offered and then there urged before the Court the following grounds of objection.

"If your honor please, in the interest of time, I don't think it is relevant or material going into the exact mode of questioning, etc., that led up to this application. He signed the application and it is in writing and made a part of the policy; and under the law of New York it is there in writing and cannot be gainsaid. Certainly there are no pleadings to justify any upsetting of this writing. Suit is brought on this contract as written, and this application is a part of the contract and is set us an exhibit to the suit."

The court overruled said objection and admitted the foregoing question and answer.

Immediately thereafter the plaintiff, Mrs. Edna K. Yates, on direct examination by plaintiff's counsel, was asked the following question:

"What did your husband tell the agent of that Company, Mr. Schickler, at the time he asked him that question?" To which question the plaintiff, Mrs. Yates, answered as

[fol. 31] follows: "He told him nothing more than for indigestion."

Movant objected to the evidence as soon as and at the time it was offered, and then there urged before the Court the following grounds of objection:

"We move to exclude that answer and object again to the question as being irrelevant and immaterial and incompetent under the pleadings in this case, and under the law of New York, which governs this case. The evidence shows that Mrs. Yates—by Mrs. Yates—that this contract was applied for in Long Island, New York, was delivered in Long Island, New York, and Mr. Yates died in New York City; and it is a New York contract issued under the statutes of that State; and the statutes of that State provide that 'Every policy of insurance issued or delivered within the State on or after the first day of January, 1907, by any life insurance corporation doing business within the State, shall contain the entire contract between the parties and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application, or other writings, unless the same are endorsed upon or attached to the policy when issued; and all statements purporting to be made by the insured shall, in the absence of fraud, be deemed representations and not warranties. Any waiver of the provisions of this Section shall be void.' And I believe Your Honor is familiar with the case that I have heretofore called to your attention construing that statute."

The Court overruled said objection and ruled that plaintiff's counsel could ask said question for the purpose of showing notice, if it does.

Immediately thereafter the plaintiff, Mrs. Yates, on direct examination by plaintiff's attorney, was asked the following question:

"Now Mrs. Yates, when your husband—when the agent of the company asked your husband that question, what did your husband tell him there in your presence?"

To the asking of this question, movant's counsel objected as soon as and at the time said question was asked, and then and there urged before the Court the following grounds of objection:

"You understand we make the same objection to this."

Immediately thereafter the plaintiff, Mrs. Yates, on di-
[fol. 32] rect examination by plaintiff's attorney, was asked the following question:

"When the agent asked your husband the question, had he in the last five years had medical advice from any doctor, what did your husband tell him?"

To which question the plaintiff, Mrs. Yates, made the following answer:

"He told him he had not had any medical advice, only that he had had a slight indigestion."

Immediately thereafter the plaintiff, Mrs. Yates, testified further on direct examination by plaintiff's attorney:

"Q. What did the agent say then?" "A. He said, 'That is all right.'"

Movant objected to the evidence as soon as and at the time it was offered and then and there urged before the court the following grounds of objection:

"If Your Honor please, I move to exclude her testimony as to that conversation with the agent, as being irrelevant, immaterial and incompetent under the law of the State of New York, to in any wise affect the validity of this contract sued on or to add to or vary its written terms as set up by the plaintiff in her petition in this case."

The court overruled said objection and admitted the evidence for the sole purpose, if any, if it does show any notice.

Movant avers that the evidence was material, prejudicial, and hurtful to movant, for the reasons stated in movant's objection to said evidence herein.

Ground 2. After plaintiff rested her case, the defendant began the introduction of its evidence. The defendant introduced in evidence Section 58 of the Insurance Law of the State of New York (Laws of 1906, c. 326) reading as follows:

"Policy to Contain the Entire Contract: Statements of Insured to be Representations and Not Warranties.

Every policy of insurance issued or delivered within the State on or after the first day of January, nineteen hundred and seven, by any life insurance corporation doing business within the State shall contain the entire contract between the parties and nothing shall be incorporated therein [fol. 33] by reference to any constitution, by-laws, rules, application or other writings unless the same are indorsed upon or attached to the policy when issued; and all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties. Any waiver of the provisions of this section shall be void."

The defendant also introduced in evidence the decision of the Court of Appeals of the State of New York, which is the Court of last resort of that State, in the case of Minsker v. John Hancock Mutual Life Insurance Company, 173 N. E., 4; 254 N. Y. 333. So much of this decision as is applicable hereto as follows:

"Prior to January 1, 1907, when section 58 of the Insurance Law (Consol. Laws, c. 28) became effective, the courts of this State had decided in numerous cases that, if the medical examiner of a life insurance company was truthfully told, by the applicant for a policy, of facts which under the terms of a policy would make it void if not noted upon it, the company could not avail itself of the defense that such facts were not stated in the policy the underlying principle being that it would be a fraud upon the insured to accept pay for a policy which the company through its agent knew was void when delivered. Such was the case of Sternaman v. Metropolitan Life Insurance Company, 170 N. Y. 13. The Federal Supreme Court adopted a different view, and held that a void policy could not be made valid by parol testimony to the effect that the company's agent had knowledge of the true facts and that the answers as written in the application were incorrectly written by the Company's agent. Northern Assurance Company v. Grand View Building Association, 183 U. S. 308."

"After the enactment of that statute, the case of Sternaman v. Metropolitan Life Insurance Company, supra, and others to the same effect, ceased to be authority upon the question in an action upon a life insurance policy issued by

a 'life insurance corporation doing business within the State,' when a copy of the application was indorsed upon or attached to the policy. The statutory rule superseded the court-made rule."

"The policy must now contain the entire contract. All applications, statements, and agreements, if they are to have effect as a part of the policy, must be physically endorsed thereon or attached thereto, so that the insured when [fol. 34] he receives a policy may know all of its terms by reading it or having it read."

"Since 1907, the insurer is under a duty to indorse or attach the application if the statements therein contained are to have contractual effect, or even the effect of a collateral representation."

"When an insured receives a policy, it is his duty to read it or have it read, and, if an application incorporated therein does not contain correct answers to the questions asked by the medical examiner it is his duty to have it corrected. In such circumstances a recovery will no longer be permitted beause the medical examiner incorrectly recorded the applicant's answers or because the insured was unable to read or neglected to read the policy."

The foregoing statute and decision of the Court of Appeals of the State of New York was admitted in evidence by the Court. Immediately thereafter movant's attorney made the following motion:

"If Your Honor please, in view of this statute of New York and these decisions of the Court of Appeals of New York, we wish to move at this time to exclude from the evidence the testimony of Mrs. Yates on yesterday to the effect that she heard her husband state to the agent that he had suffered only from indigestion, and that conversation that she testified to that occurred between her husband and the agent, no reference to which appears in the application. That testimony we object to under the decisions of the Court of Appeals of New York, and under that Section 58 of the Statutes of New York, as being irrelevant, immaterial and incompetent. The insured or the beneficiary in the policy has sued on the policy, which policy contains as a part of the contract a copy of that written application; and she is bound by that contract and will not be heard

to contradict it, or add to it in any way by her oral testimony at this trial."

The testimony of Mrs. Yates, the plaintiff, referred to in the within and foregoing motion by movant is as follows:

"I did hear the agent ask my husband if he had had medical advice from any physician in the last five years. At the time the agent of the company, Mr. Schickler, asked my husband that question, my husband told the agent nothing more for than indigestion. When the agent of the company asked my husband that question, my husband in my presence told him he had not had any medical advice, only [fol. 35] that he had had a slight indigestion. The agent then said 'that is all right.' "

The foregoing testimony was elicited from Mrs. Yates, the plaintiff, at the instance of the plaintiff's attorney, over objection of movant's counsel at the time of its introduction. The court overruled movant's motion to exclude said evidence set forth herein. Movant says that said evidence was material, prejudicial, and hurtful to it and was inadmissible under the Statutes and decisions of the State of New York for the reasons assigned in said motion, said contract having been applied for, issued, and delivered in the State of New York.

Ground 3. Because the Court erred in charging the jury as follows:

"Our law declares, gentlemen, that the lex loci, that is the law of the State of New York in the case at bar, controls as to the validity, form and effect of the contract; and the lex fori, that is the law of the State of Georgia in the case at bar, controls as to the remedies thereon. The Courts of the State of Georgia will recognize this contract of insurance, gentlemen, as a valid contract, because it appears to be such under the laws of New York, and is clearly such under the laws of the State of Georgia, but will give the plaintiff and the defendant, respectively, for the purpose of enforcing it, on the one hand, or defeating it, on the other, such remedies only as are given to other persons who sue or are sued in the courts of the State of Georgia."

Movant avers that the last sentence of the foregoing charge was error and injurious to movant, because said portion of said charge was argumentative, being an exact quotation from the language of the Supreme Court in the case of Massachusetts Life Association v. Robinson, 104 Georgia, page 286, the exact language of said decision of the Supreme Court being as follows:

"That the lex loci controls as to the validity, form and effect of the contract, and the lex fori as to the remedies thereon is simply a statement of elementary law. The Courts of the State of Georgia will recognize this contract as a valid contract, because it appears to be such under the [fol. 36] laws of Massachusetts, and is clearly such under the laws of this State, but will give the plaintiff and the defendant, respectively, for the purpose of enforcing it on the one hand, or defeating it on the other, such remedies only as are given to other persons who sue or are sued in the courts of this State."

Said portion of said charge is further erroneous and injurious to movant for the reason that the same expresses an opinion by the court as to the validity of the contract sued upon, whereas it is contended by movant in its pleadings filed in said suit that said contract was void under the laws of the State of New York, on account of material misrepresentations made by the applicant for said policy in the procuring of the same, and that on account of said misrepresentations the liability of movant was limited to the amount of premiums paid in the sum of $15.80, said contract of insurance sued upon having been applied for, issued and delivered in the State of New York.

Movant avers that said portion of said charge was further erroneous and injurious to it because the same was misleading to the jury, giving the opinion of the court that said contract was valid, notwithstanding contentions of movant that said contract was void for material misrepresentations in procuring the same.

Ground 4. Because the court erred in charging the jury as follows:

"Our law further declares, gentlemen, that all persons applying for life insurance in a life insurance company writing life insurance in this State shall submit to such reasonable rules and regulations as may be prescribed by

such insurance companies; and after a policy is issued on the life of such person, the beneficiary of such policy shall be entitled to collect the amount of such policy under the terms of the contract when it matures, unless the applicant or beneficiary has been guilty of actual fraud or has made material misrepresentations in procuring such policy, which misrepresentations change the character and nature of the risk as contemplated in the policy so issued by the company. All statements, covenants and representations contained in applications for insurance shall never be held or construed to be warranties, but shall be held to be representations only."

[fol. 37] Movant avers that the foregoing charge by the court was error and injurious to movant for the reason that the contract of insurance sued upon was applied for, issued and delivered in the State of New York, and is, therefore, governed by the Statutory enactments of the State of New York and the interpretations thereof by the highest court of New York, which were introduced in evidence in said case; whereas the foregoing charge embodies a statutory enactment of the State of Georgia (Georgia Laws 1927, page 223), and movant avers that the contract sued upon in said case is not governed by said statutory enactment as charged by the court for the reason, as movant alleges, said statutory enactment applies only to persons making application for insurance within the borders of the State of Georgia, and is not an attempt by the legislature to regulate the business of insurance in a foreign state. Said statute affects the validity, form and effect of contracts entered into within the State of Georgia, and it was therefore error for the court to charge said statute as the same had no application to the policy sued upon in this case.

The giving of said statutory enactment of the State of Georgia by the court to the jury was further error for the reason that the same was misleading, giving the erroneous impression to the jury that the contract was governed as to its form, effect and validity by the laws of the State of Georgia.

Ground 5. Because the court erred in charging the jury as follows:

"If you find from the evidence, gentlemen, that there is testimony relative to statements Mrs. Yates claims to have

heard her husband make, I charge you that that testimony was admitted, gentlemen, for the purpose of showing notice, if it does show notice in any way, to the Company; and I charge you that those statements that she claims she heard or parol testimony as to those statements could not vary the terms of a written contract of insurance; but, as before stated, gentlemen, are admitted only as a circumstance you may consider for the purpose of showing notice, if you find they were made, and if they do show anything in regard to whether or not the insured made false statements that were material, and for the purpose of showing, gentlemen, as before stated, any notice to the company, if it does."

[fol. 38] Movant avers that so much of said charge as authorizes the jury to consider testimony of Mrs. Yates to the effect that she heard her husband make certain statements to movant's agent at the time of the application for said insurance, which said statements were not incorporated in said application, for the purpose of showing notice of the contents of said alleged statements to movant, though not incorporated in said application, and authorizing the jury to consider said statements as having a bearing upon the question of whether or not the insured made false statements that were material when such statements were not incorporated in the written application for said policy, was error and prejudicial to movant for the reason that said contract of insurance was applied for, issued and delivered in the State of New York and under the laws of the State of New York embodied in its statutory enactments and interpretation of said statute by the court of last resort of the State of New York, said alleged statements not incorporated in the written application are not notice to movant, and are inadmissible in evidence under the laws of the State of New York for any purpose.

Ground 6. Because the court erred in charging the jury as follows:

"Our law, gentlemen, declares further where limitations upon the authority of an agent who solicited the insured to enter into the contract are contained only in the policy itself, they are to be deemed as referring to matters occurring subsequently to the issuance of the policy, they do

not apply to facts or conditions which were existing at the inception of the contract. In such case the knowledge of the agent is the knowledge of the insurer, and if a policy is issued with knowledge by the agent of a fact or condition which, by the terms of the contract, would render it void, the insurer will be held to have waived the existence of such fact or condition, and the policy will not be voided thereby."

Movant avers that said charge was error and prejudicial to it for the following reasons:

(a) Because the validity, form and effect of said contract of insurance sued upon is governed by the statutory enactments of the State of New York, and the interpretations placed upon said statute by the courts of last resort of the [fol. 39] State of New York, said contract having been applied for, issued, and delivered in the State of New York; whereas, said charge complained of is a direct quotation of the language used by the Court of Appeals of Georgia, in the case of Interstate Life & Accident Company vs. Bess, 35 Ga. App., 723, said decision of the Court of Appeals having been rendered in connection with a contract, the validity, form and effect of which was governed by the laws of the State of Georgia.

(b) Because the foregoing charge by the Court to the jury which affects and has a direct bearing upon the validity, form and effect of the contract sued upon, is not the law of the State of New York. Said contract sued upon was applied for on May 2nd, 1932, at Jamaica, New York, and said contract bears as its date of issue May 12th, 1932, and was delivered to the said insured in the State of New York.

Movant avers that the law of the State of New York touching the subject matter of said charge is as follows:

Section 58 of the Insurance Law of the State of New York (Laws of 1906 c. 326) is as follows:

"Policy to Contain the Entire Contract: Statements of Insured to be Representations and not Warranties. Every policy of insurance issued or delivered within the State on or after the first day of January, nineteen hundred and seven, by any life insurance corporation doing business within the State shall contain the entire contract between the parties and nothing shall be incorporated therein by

reference to any constitution, by-laws, rules, application or other writings unless the same are indorsed upon or attached to the policy when issued; and all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties. Any waiver of the provisions of this section shall be void."

The foregoing statute was introduced in evidence by movant.

Movant also introduced in evidence the decision of the Court of Appeals of the State of New York, which is the court of last resort of that State, in the case of: Minsker v. John Hancock Mutual Life Insurance Company, 173 N. E. 4, 254 N. Y. 333.

"Prior to January 1, 1907, when section 58 of the insurance law (Consol. Laws, c. 28) became effective, the courts [fol. 40] of this State had decided in numerous cases that, if the medical examiner of a life insurance company was truthfully told, by the applicant for a policy, of facts which under the terms of a policy would make it void if not noted upon it, the company could not avail itself of the defense that such facts were not stated in the policy, the underlying principle being that it would be a fraud upon the insured to accept pay for a policy which the company through its agent knew was void when delivered. Such was the case of Sternaman v. Metropolitan Life Insurance Company, 170 N. Y. 13. The Federal Supreme Court adopted a different view, and held that a void policy could not be made valid by parol testimony to the effect that the company's agent had knowledge of the true facts and that the answers as written in the application were incorrectly written by the company's agent. Northern Assurance Company v. Grand View Building Association, 183 U. S. 308."

"After the enactment of that statute, the case of Sternaman v. Metropolitan Life Insurance Company, supra, and others to the same effect, ceased to be authority upon the question in an action upon a life insurance policy issued by a 'life insurance corporation doing business within the State,' when a copy of the application was indorsed upon or attached to the policy. The statutory rule superseded the court made rule."

"The policy must now contain the entire contract. All applications, statements, and agreements, if they are to

have effect as a part of the policy must be physically endorsed thereon or attached thereto, so that the insured when he receives a policy may know all of its terms by reading it or having it read."

"Since 1907, the insurer is under a duty to indorse or attach the application if the statements therein contained are to have contractual effect, or even the effect of a collateral representation."

"When an insured receives a policy, it is his duty to read it or have it read, and, if an application incorporated therein does not contain correct answers to the questions asked by the medical examiner it is his duty to have it corrected. In such circumstances a recovery will no longer be permitted because the medical examiner incorrectly recorded the applicant's answers or because the insured was unable to read or neglected to read the policy."

[fol. 41] Movant avers that the only testimony in the record by virtue of which movant's agent could have obtained any knowledge of any fact or condition having a bearing upon the validity of the contract at the inception thereof is embodied in the testimony of Mrs. Yates, the plaintiff, which is as follows, to wit:

"I did hear the agent ask my husband if he had had medical advice from any physician in the last five [sic.] years. At the time the agent of the company, Mrs. Schickler, asked my husband that queston, my husband told the agent nothing more than for indigestion. When the agent of the company asked my husband that question, my husband in my presence, told him he had not had any medical advice, only that he had had a slight indigestion. The agent then said 'that is all right.'"

Movant therefore avers that under the law of the State of New York that notwithstanding the fact that there were no limitations placed upon the authority of movant's soliciting agent in the application for the contract of insurance sued upon, any knowledge obtained by movant's soliciting agent at the time of the taking of the application for said contract, which said knowledge or information was not actually embodied in said written application would not be the knowledge of movant and would not be chargeable to movant for the reason that the said information was not

incorporated in said written application. And movant avers that under the law of the State of New York knowledge of its soliciting agent of facts or conditions which would render the policy void, but which facts or conditions were not incorporated in said written application which was attached to and made a part of the policy of insurance sued upon, would not constitute a waiver of said facts or conditions by movant.

Ground 7. Movant avers that said verdict and judgment in so far as the same awards twenty-five per cent. of the principal amount as damages in the sum of $500.00, or any part thereof, is contrary to law, contrary to the evidence, and contrary to the principles of justice and equity, and without evidence to support same.

Ground 8. Movant avers that said verdict and judgment in so far as the same awards attorneys' fees of $250.00 or any part thereof, is contrary to law, contrary to the evidence, and contrary to the principles of justice and equity, and without evidence to support same.

[fol. 42] Wherefore, movant prays that these its additional grounds of motion for a new trial be inquired of by the court, approved, and allowed, and that a new trial be granted it.

Smith, Smith & Bloodworth, Boykin & Boykin, Attorneys for Movant.

The recital of facts contained in the foregoing amendment to and of the original motion for a new trial is hereby approved as true and correct, and all of the grounds of the amendment are approved; and the amendment is hereby allowed. Except as to grounds 8 and 9, the plaintiff having written off verdict and judgment for damages and atty's fees. This 7 day of May, 1934.

J. J. Reese, Judge City Court of Carrollton.

[File endorsement omitted.]

[fol. 43] In City Court of Carrollton, Georgia, December Term, 1932

Number 162

Mrs. Edna K. Yates, Plaintiff,

vs.

John Hancock Mutual Life Insurance Company, Defendant

Brief of Evidence—Filed May 11, 1934

Plaintiff's Testimony

Mrs. Edna K. Yates, the plaintiff herein being duly sworn, testified as follows:

Direct examination.

By J. L. Smith:

My name is Mrs. Edna K. Yates. I live at Bowdon, Georgia. Harmon H. Yates was my husband. He is dead. He died June 23, 1932, in Jamaica, Long Island, New York. I said I was the wife of Harmon H. Yates. Before I moved to New York I resided in Atlanta—I beg your pardon; East Orange, New Jersey. Before I moved to New Jersey I resided in Atlanta. Before I moved to Atlanta I resided in Memphis, Tennessee. My husband was engaged in the automobile tire business. I was married to Mr. Yates in Bowdon, Georgia. At the time Mr. Yates got sick he was employed by the Chelsea Tire Company; that was at Jamaica, Long Island. I lived there. My husband died in a hospital. He went to a hospital on May 29th, 1932. That was on Sunday afternoon. He quit working on the Saturday before he entered the hospital Sunday. He quit working late at night, Saturday night. He quit for the week end, on Saturday night. I was present at the time that an application was made by my husband for some life insurance. The application was made in my home. Mr. Yates and the agent and I were present. I don't remember the name of the agent. Schickler sounds like it, but I don't know. The date of that application was May 2nd. That life insurance

policy of John Hancock Mutual Life Insurance Company was delivered to me in my home for my husband. The policy was delivered by the agent who took the application. The premium was paid by me and he left the policy at my home for my husband. I delivered the policy to my husband when he came home. That was on May 2nd. The policy was delivered on May 12th. At that time, as I re-[fol. 44] member, I lived not more than four or five blocks from the district office of the John Hancock Mutual Life Insurance Company. I know Mr. Sulzer, the district manager there. I was acquainted with him. After the policy was delivered and the premium paid, my husband continued to work up until the 29th of May. After my husband's death I went to the office of Mr. Sulzer.

I had a conversation with him, Mr. Sulzer, and he gave me a form to have filled out. I had them filled out. I delivered them back to him. Mr. Rickmeyer gave me that statement. At Mr. Sulzer's suggestion I got that statement from Mr. Rickmeyer. Mr. Sulzer was the manager of the insurance company. The letter I got from Mr. Rickmeyer I gave it to Mr. Sulzer. Mr. Sulzer was the manager of the John Hancock Mutual Life Insurance Company. I carried this statement from Mr. Rickmeyer to Mr. Sulzer at the time I carried him the proof of loss that he gave me the form for—the proof of death—I carried this letter back with the proof of death when I filed it. This two thousand dollars or no part of it has ever been paid me. They have never offered to pay me that amount. They only tendered me back the premium. They have never paid me the policy or the amount of the policy, two thousand dollars. I did not accept the money that they tendered to me. I sent it back to them.

Cross-examination of Mrs. Edna K. Yates.

By Mr. Alex Smith:

(Indicating.) That is the letter I sent the premium back by—to the Company, dated Bowdon, Georgia, and it has got a date stamped on it July 28, 1932 (indicating). That is my signature. That printed form headed John Hancock Mutual Life Insurance Company is the form I sent back with the check (indicating). That is the letter in which the check for the premium was sent me, dated July 15, 1932,

directed to me at Bowdon, Georgia, signed H. Sulzer, District Manager. I am familiar with my husband's signature. That paper headed "Application for Insurance in the John Hancock Mutual Life Insurance Company," is signed by my husband—that is his signature. That is the original paper that he filled out on May 2nd that I talked about. When we were living in Jamaica, New York. We were still living in Jamaica, New York, when I got the policy. That is my signature to the paper marked Certificate Number 1, "Claimant's Statement," dated June 23, 1932. That is one of the papers that I gave to Mr. Sulzer. I am not uncer-
[fol. 45] tain about that—I am positive. That paper marked Certificate Number 2, "Attending Physician's Statement," is another paper that I took to Mr. Sulzer. That paper headed "Physician's Certificate," dated June 27, 1932, signed C. L. Davidson is the paper I gave to Mr. Sulzer. I gave all three of them to him at the same time. I gave him those three papers at the same time I gave him this letter that I was talking about from Mr. Rickmeyer. Mr. Yates died on the 23rd and I gave Mr. Sulzer all four papers on the 23rd. My husband went to the hospital on the 29th of May. He went to the hospital for a diagnosis. He went to the hospital of his own accord. He had developed a swelling of the ankles and some temperature. He had had temperature for not more than two days. His temperature the last time I remember it before he went to the hospital wasn't over 100½ or 101. It was 101. He never complained of the pains in his stomach but once that I know of, and that was in April. I don't know about when in April, but it was 1932. He went to see Doctor Davidson at that time, the same day. I did not go with him to see Doctor Davidson. I went to Doctor Davidson's office after he died, to get that certificate. I went to Doctor Davidson's office the day he died. Doctor Davidson gave him milk of magnesia the day that he went to see him. I do not know what day in April that was. I never knew my husband going to see Doctor Davidson more than the one time. I didn't know *know* of my husband taking but one dose. He was not taking it in May. Just took it one time, so far as I know. I went to the hospital with my husband. I did not see Dr. Schmidt there that day. As I remember my husband was operated on June 6th. He entered the 29th, and he was operated on the next Saturday. He was operated on the Saturday after

he went there on Sunday. As to who operated on him, there were several physicians; I remember Doctor Schmidt being one of them. I talked to some of the doctors before he was operated on and after they decided to operate. They didn't know what was the matter with him. They thought he needed an operation. His illness was serious enough that they wanted to operate. They opened up his abdominal cavity, the stomach there. After they operated, they told me he was hopelessly ill; they didn't pronounce it cancer then; they said the operation couldn't do him any good and he was going to die; and he did die on June 23rd. He died early in the morning. I was in the hospital. That [fol. 46] was in New York City. I don't know the mileage from Jamaica, Long Island, to New York City. Generally I had to go on a train. It took about thirty minutes for me to go from the station in New York City out to Jamaica. I left the hospital immediately after he died. I imagine that was about nine o'clock. I then went to the insurance office. The insurance office was in Jamaica. I had the insurance policy at that time. I did not have the policy in my possession before he died; I went by my home, and then to the insurance office. I had to go by my home in going to the insurance office. I got the policy then, and went to the insurance office. I got those three blanks that you showed me. I then went back to New York and got Doctor Schmidt to sign this Certificate Number 2. I don't remember whether I went to see Doctor Davidson before or after I went to see Doctor Schmidt. I went to see Doctor Davidson also that day. And also Mr. Rickmeyer and got that letter, and all four of the papers. That was all on the same day. I took them back to Mr. Sulzer that same day. I knew that there was an autopsy performed on my husband after he died. That was done right after he died. You have that written report of that autopsy, don't you? Well, my attorneys have it then. My attorneys have a report of that autopsy. So far as I know it is in writing, a written report of the doctors who made the autopsy. I have seen it and read it. My attorneys should have a copy of it. I got a copy for them.

Redirect examination of Mrs. Yates.

By Mr. J. L. Smith:

I talked to Doctor Schmidt after the first operation on my husband. Doctor Schmidt didn't know what was wrong with him. They told me that. That was something like seventeen days before my husband died. They asked me for permission to perform an autopsy, after his death. They gave me a written finding of the doctor after the autopsy was performed. I gave the finding to you. I don't remember just when I gave it to you. The undertaker gave me that. This form that was filled out, reporting the autopsy, was given to me by the undertaker. The doctors did not give me any finding that they made. The doctors didn't give me anything, except these papers that were filled out here. The ones that Mr. Alex Smith asked me about here a while ago. There was a paper filled out after the autopsy, that was given by the undertaker. My husband told me he had been to see some doctor—in April.

[fol. 47] My husband never complained of having any indigestion or anything else after he took the milk of magnesia. About two days before he went to the hospital we noticed that there was something the matter with him. That would be on Friday. He worked on that Friday. He worked every day. He worked on Saturday. On the Sunday that he went to the hospital, we went to church on Sunday morning, and from there home to dinner, and then he went to the hospital Sunday afternoon. After dinner we went to the drug store. Mr. and Mrs. Kemp were with us. We then went by a theater and dropped Mrs. Kemp there. She was working at the theater. We then went home. We left to go to the hospital about three o'clock in the afternoon. That application was made at my home. The agent asked those questions and put those answers in there in writing. The agent asked my husband questions. The agent asked the questions and put down the answers. I heard the agent ask my husband if he had had medical advice from any physician in the last five years. My husband told the agent —nothing more than for indigestion. My husband told him he had not had any medical advice, only that he had had a slight indigestion. The agent then said, "That is all right."

Recross-examination.

By Mr. Alex. Smith:

I recall several months ago when you came down here to Carrollton and took my testimony. I said that I was present when the application was made out. I said the agent came to my home and took the application in my presence. I said I heard the entire conversation between he and the agent. I said he told the agent the facts as stated in the application. I said I saw the application when it was filled out and signed. I said that I read it and it was correct, according to the conversation. After my husband died I got some papers from an undertaker, and gave that to Mr. Jim Smith. I didn't get anything from the doctors except these forms that they have.

I have a copy of the autopsy. I have a copy of that report. I gave that to my attorneys.

* * * * * * *

[fol. 48] Mrs. Edna K. Yates, the plaintiff, recalled as a witness, further testified as follows:

Direct examination.

By Mr. J. L. Smith:

I stated yesterday that I went after my husband's death, the same day that he died,—that I went to the District Manager of the John Hancock Mutual Life Insurance Company, Mr. Sulzer. The reason I went immediately to the insurance company as soon as my husband died, was that I was going to bring the body back to Bowdon for burial, and I went immediately to put in the application for it. Mr. Sulzer told me to go to the company that Mr. Yates was working for and get a letter from them and also to take these forms to this company and have them filled out and there would not be any hesitancy in my getting the money right away. Mr. Smith, I didn't receive anything at the hospital except these forms that I had filled out by the physicians. I received that from the doctors. Nobody gave me any paper up there besides those papers that I got filled out. I was mistaken about that yesterday. I got a permit from the undertaker to remove the body. I did

not turn over any paper to Smith & Millican. I saw those papers in your office—they were attached to the depositions taken by Mr. Alex Smith in New York. I did not turn any paper over to you with reference to any examination or anything from the New York Hospital. I read that in Mr. Smith's and Mr. Millican's office. I don't know where you got it, of my own knowledge.

Cross-examination of Mrs. Yates.

By Mr. Alex Smith:

As to what it was I read in Mr. Smith's office, it was concerning the autopsy operation that was performed. I didn't give them any papers. I read the papers in his office about the autopsy. But where they got it I don't know. They got a report of the autopsy. I didn't furnish it to them. I don't remember the day of the week that this application was signed. I don't know the day of the week that the policy was delivered to me; I remember the day, but not the day of the week. I do not remember the day of the week that my husband died. It is not the dates I don't remember; I remember the dates distinctly. Why shouldn't they be fixed in my mind, a thing like that? Would you forget the date that your wife died on?

"Q. Well, I was referring now to a number of dates, the date that that application was signed, and the date that the policy was delivered, and the date that your husband [fol. 49] went to the hospital. I can well understand how you would remember the day that he went to the hospital and the day he died; but I am asking you now about what fixed in your mind the date of the application for insurance or the date of the delivery of the policy?"

"A. Well, I just remember the date when that was done; they come to my home to do it and I was present at the time."

The application was made at night. The policy was delivered some time during the day, but I don't remember just what time of the day.

* * * * * * *

The defendant introduced in evidence the testimony of DR. CHESTER L. DAVIDSON, taken by deposition at New York City, New York, as follows:

I am duly licensed to practice medicine in the State of New York, I have been so licensed for thirteen years. I am a graduate of Vanderbilt University, Medical Department, Nashville, Tennessee. I have been practicing medicine in New York for thirteen years. My address at present is 8820 146th Street, Jamaica, Long Island, New York. In his life time, I knew a man by the name of Harman H. Yates. He was a patient of mine. I think I first met or came to know Mr. Yates in 1932, I think it was. I should say it was in April. As to under what circumstances I met Mr. Yates, I can not answer a question that leads to any information that I have in concern to the patient of mine. I claim a privilege as to anything as far as his sickness is concerned. I met Mr. Yates in the month of April, 1932, as a patient. After the first meeting, I thereafter saw him as a patient four times. I treated Mr. Yates on all four occasions, or I attempted to. On all four occasions I gave Mr. Yates medical advice. The dates of those four visits were April 15, April 21, April 22, and April 29. I don't know whether Mr. Yates, within the dates I have just mentioned, was in any hospital. I did not see Mr. Yates in [fol. 50] any hospital myself. I saw Mr. Yates upon the four mentioned dates in my office. Mr. Yates came to me as a patient of his own accord. I did not see Mr. Yates at any place other than at my office. When Mr. Yates came to me I examined him thoroughly physically. I was unable to state my diagnosis of a specific cause of any condition which I observed. That is so, after he visited me upon four occasions. On those four occasions I had him under observation and examined him. (Indicating) That paper designated "Form 453" and bearing the heading "Physician's Certificate—John Hancock Mutual Life Insurance Company, Boston, Massachusetts," bears my signature. Upon looking at that form 453, my memory is not refreshed as to the making of the diagnosis of any definite cause of Mr. Yates' condition as a result of my examination of him and of his visits to me. I had an opinion at the times that I have mentioned when I saw Mr. Yates, as to the cause of any condition which I observed. That opinion was that of a condition or ailment or disease which

he might possibly have but the exact cause of which I did not know. A primary anemia is a disease of the blood and blood-forming organs; a secondary anemia is a disease of the blood which follows in the wake of other disease. As to whether secondary anemia could be attendant upon or result from the development within the body of a tumor, that all depends on what kind of a tumor it is.

Q. "Well, specifically, a retro peritoneal tumor.
A. That all depends upon what kind of retro peritoneal tumor it is."
Q. "A malign or malignant.
A. Yes."

As to whether secondary anemia can be caused by or result from the development within the body of a malignant retro peritoneal tumor—yes. The development within the body of a malignant retro peritoneal tumor is a competent producing cause of secondary anemia. I know Mrs. Edna K. Yates, the wife of the patient referred to before. I knew her prior to the death of Mr. Yates. I did not know her prior to the time that Mr. Yates first came to see me. I first met Mrs. Yates in my office approximately before one of those dates, she came in with Mr. Yates some time in April, 1932. Referring to "Defendant's Exhibit B for identification," I signed that paper on June 27, 1932. As to who gave me that paper, I think Mrs. Yates [fol. 51] did, I am not sure about that. I filled the paper out myself. Having filled it out, I then signed it and it was notarized. That occurred in my office. I then gave it to Mrs. Yates. As to whether I had any conversation with Mrs. Yates concerning the purpose for which she wanted this paper filled out, and signed by me, I think she said the insurance company required it. I do not remember that there was any conversation with reference to what it was required for. As to whether my looking at that paper refreshed my recollection as to any purpose for which it was required, according to the conversation I had with Mrs. Yates, Yes, as far as his death is concerned—with reference to claim for proceeds of the policy of insurance of the John Hancock Mutual Life Insurance Company. I understood that to be the purpose of the filling out of the paper when she presented it to me and asked me to

fill it out and sign it. In my opinion, secondary anemia is not a more serious condition than primary anemia. As to whether or not in diagnosing the cause of secondary anemia, I can always apply the same standard or whether these so-called malignant tumors usually react differently —As far as the diagnosis of secondary anemia itself is concerned, it isn't so difficult to make that diagnosis but the cause of secondary anemia is more often very difficult and sometimes impossible. There is no set rule by which I try to ascertain the cause of secondary anemia. One man might have a malignant tumor and show no secondary anemia while another man might have a malignant tumor and show secondary anemia. And, then, the other way around, a man might have secondary anemia and no tumor. There is no definite standard by which I can practice the medical profession. At times the condition which produces the secondary anemia is very difficult to determine. As to whether it very frequently is and can be determined by an operation—I might say yes*t* to that but usually you can determine most of the cases without operation.

"Q. But in the case you can determine without operating, and as I understand you to say, that in this particular case of Harman Yates you could not determine definitely the cause of his condition, in such a case the exact condition which caused the exact disease which resulted in his condition might well only be determined by an operation, is that not correct?

A. Quite possibly."

* * * * * * * *

[fol. 52] Mrs. Edna K. Yates, the plaintiff herein, recalled in rebuttal, further testified as follows:

Direct examination.

By Mr. J. L. Smith:

I never saw Dr. Davidson before my husband died. I had never met him. I never went to his office until I went over there to get this statement fixed out for the insurance company, after my husband's death. I said I lived in about two or three blocks of the district office of the John Hancock Mutual Life Insurance Company. I do not know where

Mr. Schickler lived. I said I got the policy and paid for it on May 12th, the day it was issued.

"Mr. Alex Smith: If Your Honor please, Mr. (J. L.) Smith and I agreed that I will read into the record this statement: That Mrs. Yates will testify that she and her husband moved from East Orange, New Jersey, to Jamaica, Long Island, in March, 1932."

[Title omitted]

OFFERS IN EVIDENCE

The plaintiff introduced in evidence the original policy of life insurance sued upon in the above stated case, issued by the John Hancock Mutual Life Insurance Company to Harman H. Yates, to which was attached a copy of the written application signed by Harman Harlin Yates for said insurance. A copy of said policy of insurance and said written application are copied as an exhibit and set out as a part of the plaintiff's pleadings, and are hereby incorporated in and made a part of this brief of evidence by reference to said copies appearing in the pleadings and are referred to herein as Plaintiff's Exhibit Number 1.

* * * * * * *

[fol. 53] The defendant introduced in evidence Certificate Number 1 "The Claimant's Statement to the John Hancock Mutual Life Insurance Company," signed and identified by Mrs. Edna K. Yates, a true and correct copy of which is hereto attached and made a part hereof and marked Defendant's Exhibit Number 2.

The defendant introduced in evidence Certificate Number 2, "Atttending Physician's Statement" by Dr. J. G. Schmidt, identified by the plaintiff, Mrs. Yates, a true and correct copy of which is hereto attached, and made a part hereof, marked Defendant's Exhibit Number 3.

The defendant introduced in evidence "Physician's Certificate" of Dr. C. L. Davidson, dated June 27, 1932, identified by the plaintiff, Mrs. Yates, a true and correct copy of which is hereto attached, and made a part hereof, marked Defendant's Exhibit Number 4.

The defendant introduced in evidence Section 58 of the New York Insurance Law, a true and correct copy of which is hereto attached and made a part hereof, and marked Defendant's Exhibit Number 5.

The defendant introduced in evidence the report of the decision of the Court of Appeals of the State of New York in the case of Minsker vs. John Hancock Mutual Life Insurance Company, the material portions of said decision being hereto attached and made a part hereof, marked Defendant's Exhibit Number 6.

The defendant introduced in evidence the decision of the Court of Appeals of the State of New York in the case of Travelers Insurance Company vs. Pomerantz, the material portions of said decision being hereto attached and made a part hereof, marked Defendant's Exhibit Number 7.

STIPULATION RE PAYMENT OF PREMIUMS

It was admitted by counsel for plaintiff in open Court that on the 16th day of January, 1933, at which time the answer of the defendant was filed, the defendant paid into Court by depositing the same with the Clerk the sum of $15.80, representing the entire amounts of premiums paid upon the policy in suit, which were previously tendered to the plaintiff and refused, said sum having been paid into Court by defendant for the use and benefit of the plaintiff.

(Here follow 3 photos, side folios 54, 55 and 56)

DEFENDANT'S EXHIBIT NUMBER 2.

CERTIFICATE No. 1

FORM 148 Ed. 5-30 30M

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

OF BOSTON, MASSACHUSETTS

CLAIMANT'S STATEMENT

CLAIM under Policy No. 2166887 for $ 2000 on the life of Harmon H Yates whose residence was (City) Jamaica (State) N.Y.

1. Date of birth of deceased? Apr 20 - 1894
2. Source from which knowledge of such date is obtained? Family Record
3. Date of death? June 23-32
4. Name and address of every Physician who attended during last illness? N.Y. Hospital # 8 West 16th St N.Y.C.
5. Occupation of deceased? Salesman & Manager Tire Store
6. Name and address of employer? Chelsea Tire Co 87-22-166th St Jamaica N.Y.
7. Was deceased ever an inmate of, or prescribed for at any hospital, dispensary, sanatorium or other institution? If so, when and where? N.Y. Hospital May 29/32
8. In what capacity or by what title do you make claim for this insurance? Wife and beneficiary
9. If deceased had other insurance, give names of Companies and amount in each. none

The undersigned hereby makes claim to the proceeds of said insurance and agrees that the written statements and affidavits of all physicians who attended or treated the insured, and all other papers required by the Company in making proof of claim, shall constitute and are hereby made a part of the Proofs of Death; the undersigned further agrees that by the furnishing of this form and other forms supplemental hereto, the Company shall not be considered to have admitted the validity of this claim; nor to have waived any of its rights or defenses under said insurance.

Dated at Jamaica N.Y. + Edna H Yates Claimant.

the 23 day of June 1932 Address 37-36 - 86th St Jackson Heights

Claimant.

Address

Instructions. If Policy has been assigned to any one other than the JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY as collateral security for a debt, the assignee and any other person claiming interest in the proceeds of the insurance should sign the above claimant's statement, and should also join in signing the agreement relating to an assigned Policy on the back hereof.

When Policy is payable to the estate of the deceased, a duly certified certificate or copy of appointment of executor or administrator must accompany this certificate.

OATH.

State of New York, } ss.
County of Queens }

Personally appeared before me the above-named Edna H Yates and made oath that the foregoing statements and answers by her made are true, and that she has not concealed any material fact from the Company, and that she is of legal age.

Subscribed and sworn to this 23 day of June 1932

My commission expires NOTARY PUBLIC Queens County Register's No. 3522 Queens County Clerk's No. 1515 Term expires March 30, 1934

Maria Barbi .....Notary Public.

THE OFFICIAL SEAL OF THE PERSON ADMINISTERING THE OATH MUST BE IMPRESSED
A CERTIFICATE OF HIS AUTHORITY MUST BE ATTACHED WHEN SO REQUIRED

Defendants' Exhibit No. 2-

DEFENDANT'S EXHIBIT NUMBER 3.

Defendants Exhibit "C"
March 7, 1933.
Mildred Rodriguez,

FORM 16 R
Ed. 3-27 15m 3-31

CERTIFICATE No. 2

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY
OF BOSTON, MASSACHUSETTS

ATTENDING PHYSICIAN'S STATEMENT

The undersigned was the attending physician in last sickness of Harmon Yates
of 8808 - 171st St. Jamaica, L.I. in the State of New York who died at
The New York Hospital - 8 W. 16th St. N.Y.C. in the State of New York on the
23rd day of June 19 32 and for the further information of the Company
answers as follows:

1. How long have you known the deceased? 20 days
2. How long have you been the attending physician? 20 days
3. Have you ever attended or prescribed for deceased prior to last illness? No
   If so, when and for what?
4. Has deceased received treatment from any other physicians? Yes
   If so, give names, addresses and dates of treatment. Dr. Davidson 88 20 - 146th St. Jamaica, L.I. N.Y.
5. Have you ever heard of deceased being an inmate of, or prescribed for at any hospital, dispensary, sanitarium or other institution?
   If so, when and where?
6. Date of your first visit or prescription in last illness? June 3rd, 1932
7. Date of your last visit? June 23rd, 1932
8. When, in your opinion, was health first impaired?
9. What disease caused death? Carcinoma (or Sarcoma) of Intestine
10. When did the deceased first commence to show symptoms of the disease which caused death? March, 1932
11. Did you acquire this knowledge from statements made to you by the deceased?
    If not, is your opinion based solely upon your professional judgment?
12. Was it complicated by any other disease? No
    If so, by what, and for what period of time?
13. Was death caused in any way by the habits or occupation of the deceased? No
14. ADDITIONAL REMARKS
    Autopsy performed June 23rd 1932 at New York Hospital.

It is hereby agreed that neither ... shall be considered as ... of the proofs of death under policy ... Claimant. In accordance with the conditions thereof.

Dated at New York Hospital 8 W. 16th St. N.Y.C. the 23rd day of June 19 32

J. F. Schmidt House Surgeon
Attending Physician.

Address New York Hospital 8 W. 16th St. N.Y.C.

OATH

State of New York
County of New York } ss.

Personally appeared before me the above-named J. F. Schmidt and made oath that the foregoing statements and answers by him made are true, and that he has concealed no material fact from the Company.

Subscribed and sworn to this 23rd day of June 1932

My commission expires Mar. 30/1934 Mildred L. Dieckhaus Notary Public.

NOTARY PUBLIC Nassau County
Certificate Filed in New York County
No. 274 Reg No. 138
Commission Expires March 30, 1934

THE OFFICIAL SEAL OF THE PERSON ADMINISTERING THE OATH MUST BE ...
A CERTIFICATE OF HIS AUTHORITY MUST BE ATTACHED WHEN SO REQUIRED.

DEFENDANT'S EXHIBIT NUMBER 4.

Defendants' Exhibit 13, for identification, March 10, 1933, Emiliano Rodriguez

d. 7-30 16m

FORM 468

PHYSICIAN'S CERTIFICATE.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY of Boston, Massachusetts

In filling out this Certificate please avoid all indefinite terms such as "General Debility," "Heart Failure," "Fever," "Lung Disease," "Childbirth," "Dropsy," "Croup," etc.

Information regarding the late Harmon H Yale

of 8808 - 178 St Jamaica NY

1. Have you ever prescribed for or attended deceased for any disease, ailment or injury? If so, please give dates and full particulars.

DATE OF ATTENDANCE			DISEASE	DURATION OF DISEASE
YEAR	MONTH	DAY		
1932.	Apr.	7.	Secondary anemia.	Unknown.

2. When, in your opinion, was health first impaired?
Unable to state

3. Please give names and addresses of any other attending physicians.
New York Hospital.

4. Has deceased ever been an inmate of, or received treatment in any hospital, dispensary, sanitarium or other institution? Please state when and where, with dates and such particulars as may be possible.
New York Hospital.

5. Have any of the deceased's family suffered from Tuberculosis? Give particulars.
Not to my knowledge.

I certify that the answers to the above questions are correct to the best of my knowledge, information and belief.

Date, June 27-1932 Signature, C. L. Dawson M. D.

Witness M Kenon Address, 8820 - 146 St

OATH.

State of N. Y.
County of Queens } ss.:

Subscribed and sworn to this 28th day of June 1932.

Before me Henry G. Lengyel
Notary Public

This certificate is only to be used for obtaining information from a physician who attended or prescribed for the deceased prior to the last illness.

56

[fol. 57] DEFENDANT'S EXHIBIT NUMBER 5

Section 58 of the Insurance Law (Laws of 1906, c. 326), Statutes of the State of New York

"Every policy of insurance issued or delivered within the State on or after the first day of January, 1907, by any life insurance corporation doing business within the State, shall contain the entire contract between the parties and nothing shall be incorporated therein by reference to any Constitution, by-laws, rules, application or other writings, unless the same are endorsed upon or attached to the policy when issued; and all statements purporting to be made by the insured shall, in the absence of fraud, be deemed representations and not warranties. Any waiver of the provisions of this section shall be void."

DEFENDANT'S EXHIBIT NUMBER 6

Minsker vs. John Hancock Life Insurance Company, 254 N. Y. *N. Y.* 333; 173 N. E. 4, held in reference to the above quoted statute, that

"Since the enactment of Section 58, a statement by the insured though incorporated into the policy, will be interpreted as a representation rather than a warranty, at all events in the absence of fraud, and so, even though erroneous, will not vitiate the policy unless material to the risk.

The policy must now contain the entire contract. All applications, statements; and agreements, if they are to have effect as a part of the policy, must be physically endorsed thereon or attached thereto, so that the insured when he receives a policy may know all of its terms by reading it or having it read.

Prior to 1907, life insurance companies were not required to attach to their policies a copy of the application, but might embody it in the contract by reference merely. The insured by reading his policy could not ascertain that the medical examiner had incorrectly recorded his answers. Since 1907, the insurer is under a duty to endorse or attach the application if the statements therein contained

[fol. 58] are to have contractural effect, or even the effect of a collateral representation.

When an insured receives a policy, it is his duty to read it or have it read, and, if an application incorporated therein does not contain correct answers to the questions asked by the medical examiner, it is his duty to have it corrected. In such circumstances, a recovery will no longer be permitted because the medical examiner incorrectly recorded the applicant's answers, or because the insured was unable to read or neglected to read the policy.

The answers to questions 14 and 15 are written and annexed to the policy established as a matter of law that they are material to the risk. The plaintiff is bound by the answers as written, since the application was physically annexed to the policy of insured, which he received from the insurer. Being a part of the policy, the statements in the application had at least the effect of erroneous and material representations under the rule at common law."

"Prior to January 1, 1907, when section 58 of the Insurance Law (Consul. Laws, c. 28) became effective, the courts of this State had decided in numerous cases, that, if the medical examiner of a life insurance company was truthfully told, by the applicant for a policy, of facts which under the terms of a policy would make it void if not noted upon it, the company could not avail itself of the defense that such facts were not stated in the policy, the underlying principle being that it would be a fraud upon the insured to accept pay for a policy which the company through its agent knew was void when delivered. Such was the case of Sternaman v. Metropolitan Life Insurance Company, 170 N. Y. 13. The Federal Supreme Court adopted a different view, and held that a void policy could not be made valid by parol testimony to the effect that the company's agent had knowledge of the true facts and that the answers as written in the application were incorrectly written by the company's agent. Northern Assurance Company v. Grand View Building Association, 183 U. S. 308."

"After the enactment of that statute, the case of Sternaman v. Metropolitan Life Insurance Company, supra, and others to the same effect, ceased to be authority upon the [fol. 59] question in an action upon a life insurance policy

issued by a 'life insurance corporation doing business within the state,' when a copy of the application was indorsed upon or attached to the policy. The statutory rule superseded the court made rule."

DEFENDANT'S EXHIBIT NUMBER 7

Travelers Insurance Company vs. Pomerantz, 246 New York 63, 158 N. E. 21

"The insurer indicated by statement 12 that it wanted to know the facts and that it intended and expected the applicant to speak the truth so that it might acquire information concerning them. Any mis-representation which defeats or seriously interferes with the exercise of such a right can not truly be said to be an immaterial one. How can an insurer discover the nature of an applicant's previous illness, subject perhaps to recurrence and apt to degenerate into a disease, yet bearing no trace at the time of his physical examination for the policy, if he falsely states that he had received no medical attention at all? "Plaintiff proved its case prima facie to the effect that the misrepresentation was material when it showed that within five years defendant had received medical attention a dozen times, that at least one medical consultation had been held, that digitalis had been prescribed in July, 1920, and that defendant was 'sick' when he received attention. It would not compel him to waive his privilege arising from his relation to his physicians, and force them to disclose the diagnosis and the nature of the treatment: He may insist upon this privilege, but he can not be heard to claim that no prima facie case has been made out. He produced no witnesses and gave no evidence concerning vital facts which could be disclosed only by him. As a witness called by plaintiff, he testified in respect to a few formal matters. He neither denied nor explained the untrue statement in his application, and he gave no information concerning the state of his health at the time of his medical attention or on the dates of his application, or of his payment of the first premium. To hold that the proof under such circumstances is less than prima facie would be to condone and encourage misrepresenta-

tions, and to impose upon a litigant conditions impossible [fol. 60] of fulfillment. Plaintiff proceeded as far as the law allowed and far enough, in the absence of denial, to require a finding of material misrepresentation. All evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted."

IN CITY COURT OF CARROLLTON

[Title omitted]

ORDER APPROVING BRIEF OF EVIDENCE

The foregoing brief of the evidence in the above stated case including pages one to forty, inclusive, and including plaintiff's exhibits numbers one and two, and defendant's exhibits one to ten inclusive, and also stipulation between counsel, is hereby approved as true and correct and as containing all the evidence both oral and documentary necessary to a proper understanding of the case. Let the same be filed as a part of the record in said case. This 7th day of May, 1934.

J. J. Reese, Judge City Court of Carrollton.

[File endorsement omitted.]

IN CITY COURT OF CARROLLTON

ORDER OVERRULING DEFENDANT'S AMENDED MOTION FOR NEW TRIAL

The within motion as amended is hereby overruled. This May 8, 1934.

J. J. Reese, J. C. C. C.

[fol. 61] IN COURT OF APPEALS OF GEORGIA

24220

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

v.

YATES.

OPINION—February 8, 1935

By the Court:

SUTTON, J.:

1. While it is true that it is the general rule that contracts are to be governed as to their form, validity and effect by the laws of the place where they are made, that is, by the lex loci contractus (Civil Code, § 8); it is also true that the mode of procedure, the character and extent of the remedies on the contract sought to be enforced, the rules of evidence, and so on, are governed by the lex fori, that is, the law of the State in which the action is instituted. Chamblee v. Colt Co., 31 Ga. App. 34; Davis v. Melton, 46 Ga. App. 639; Beck & Gregg Hdwe. Co. v. Southern Surety Co., 44 Ga. App. 518.

(a) "The materiality of representations made by the insured in his application, under the laws of Georgia, is a question for the jury to decide. The manner in which this question shall be determined, being a matter affecting the remedy only, and not the validity, form, or effect of the contract, is to be controlled by the lex fori, and not by the lex loci contractus." Messachusetts Benefit Life Asso. v. Robinson, 104 Ga. 256 (8).

(b) The law of New York is that when a life insurance policy is delivered to the insured, he must read it (or have the same read to him), and the application forming a part thereof, and if the application does not contain correct answers to the questions asked by the agent of the insurer, the insured is under a duty to so inform the insurer and have the same corrected, and when he fails to do this a recovery will not be permitted, in an action on the policy by the beneficiary against the insurer, even though the insurer's agent was

informed of the facts and incorrectly recorded the answers of the applicant. Minsker v. John Hancock Mutual Life Ins. Co., 254 N. Y. 333, 173 N. E. 4; Travelers Ins. Co. v. Pomerantz, 246 N. Y. 63, 158 N. E. 21. In this case it is undisputed that the insured visited a physician four times during April, 1932, prior to his death in June of that year, when he was suffering from indigestion, and that the application shows that the question as to whether he had re- [fol. 62] ceived medical advice during the past five years was answered in the negative. Under the New York law, as pronounced in the above decisions, a recovery could not be had by the beneficiary on this policy. However, under the law of this State, a different rule prevails. Our decisions hold that while an insurance policy will be avoided where the applicant therefor has made false answers as to matters material to the risk in the application for the insurance, such as to previous illness, soundness of health at that time, etc. (Southern Surety Co. v. Fortson, 44 Ga. App. 329); yet where the agent of the insurance company incorrectly records the answers of the applicant to questions propounded in the application as to matters material to the risk, after being informed by the applicant as to the facts, the agent's actual knowledge thereof will be imputed to the insurer and it will be held to be estopped from asserting the invalidity of the policy because of such incorrect statements as to material matters. National Casualty Co. v. Borochoff, 45 Ga. App. 745 (1), 747 and cit.; Southern Surety Co. v. Fortson, 46 Ga. App. 265 (1, 2).

2. A statement in an application for an insurance policy, that the applicant is in good or sound health at that time, is not to be construed to be a warranty upon the part of the applicant that his health is absolutely perfect. Massachusetts Benefit Life Asso. v. Robinson, supra, 104 Ga. 256 (10). Under the facts of this case, the policy sued on was not void as a matter of law because the applicant stated that he was in good health, when he had informed the insurer's agent that he had had indigestion, and when the physician who treated the applicant did not inform him that he was afflicted with a dangerous or deadly malady, the physician not being able to determine this from the applicant's condition, and it not appearing that the indigestion suffered by the applicant seriously impaired his physical state or system in any way, but it appearing, however, that the

applicant worked every day and seemed always to be in good spirits and health up to the time he went to the hospital for an examination of his condition in June, 1932. It was essential that the insured should have knowledge that he was in bad health or that there were circumstances [fol. 63] which should have led him to that conclusion, in order for a policy of insurance to be avoided by the insurer, in this State, on account of the representation by the insured that he was in sound health at the time the policy was applied for and issued, when in fact he was suffering from a malignant malady in an incipient form, from which he died shortly after the policy was issued. The term "sound or good health", as used in a policy of life-insurance, means that the applicant or insured has no grave impairment or serious disease, and is free from any ailment that seriously affects the general soundness and healthfulness of his system. Atlantic & Birmingham R. Co. v. Douglas, 119 Ga. 658; National Life & Acc. Ins. Co. v. Carter, 46 Ga. App. 1; Idem v. Lee, 46 Ga. App. 4. Under the facts of this case, the physician who treated the insured for indigestion having stated that he could not determine that the insured had a deadly malady, and the insured having informed the agent that he had had indigestion troubles, the opportunity of the insurer was equal with that of the insured to find out that the insured at the time of the application for this insurance was in reality suffering from a deadly disease from which he died shortly after the policy was issued. This policy should not be declared void, as a matter of law, because the insured had indigestion troubles in March, April, and May of 1932, and died from a cancer of the intestines in June, 1932, the policy of insurance being applied for and issued in the month of May, but the question was properly one for submission to a jury under proper instructions from the court, and this was done in the case under consideration.

(a) "This being a suit to recover by the beneficiary under a life insurance policy, which was defended upon the ground that the insured at the time of the issuance of the policy was not in sound health, and that she, in her application for insurance, made false and fraudulent representations as to her physical condition, thereby fraudulently inducing the insurer to issue the policy, and it appearing from the evidence that the jury were authorized to find that the

insured was in sound health [as that term is used in a policy of life or health and accident insurance] at the time of the issuance of the policy and did not make the false [fol. 64] and fraudulent statements as alleged," the jury properly determined this issue against the insurance company, and such a finding was not contrary to the law or the evidence. National Life & Acc. Ins. Co. v. Smith, 34 Ga. App. 242 (2).

3. In a suit upon a life-insurance policy where the defense is based upon the ground that the insured, in his application, which was a part of the policy, made misrepresentations of material facts, which changed the character or extent of the risk, the burden of showing that the representations were material and were untrue is upon the insurer, and such questions are generally issues of fact for determination by the jury. O'Connell v. Supreme Conclave, 102 Ga. 143; Life Ins. Co. v. Pate, 23 Ga. App. 232; Phoenix Ins. Co. v. Fulton, 80 Ga. 224; Conn. &c. Ins. Co. v. Mulkey, 142 Ga. 358.

4. In answering a question propounded in an application for insurance, which is a part of the insurance policy, as to previous illness and whether the applicant had consulted or been treated by a physician within the past five years, the applicant does not falsely misrepresent a material fact and void the policy, as a matter of law, where he answers such question in the negative and it appears that shortly prior to the application he had been suffering from indigestion and had gone to a physician for treatment therefor, and the physician had given him a bottle of milk of magnesia to take, it not appearing to the physician that the applicant was suffering from any serious or dangerous ailment such as affected his general health Federal Life Ins. Co. v. Summergill, 45 Ga. App. 829; New York Life Ins. Co. v. Watson, 48 Ga. App. 211.

(a) This is especially true where the insured stated to the agent filling out the applicant that he had had indigestion, and the agent replied "that is all right" and recorded the answer of the insured in the negative. See National Casualty Co. v. Borochoff, supra.

(b) This is true even though the applicant was, in connection with the above question, specifically asked if he had

[fol. 65] a cancer or tumor, and he replied "no," and was also specifically asked if he had indigestion, and he then told the agent that he had had indigestion and the agent replied "that is all right" and then recorded the applicant's answer in the negative, and thereafter the insured died from a cancer or tumor of the intestines, within two months from the date of the application.

5. The limitations upon the authority of the agent who solicited this insurance and who filled out the application were contained in the policy itself, and it has been held that such limitations apply only to matters occurring subsequently to the issuance of the policy, and that in such a case actual knowledge on the part of such agent of the insurer would be knowledge of the insurance company, and if a policy is issued with knowledge upon the part of such agent of matters or conditions which would cause the insurer to reject the application and refuse to issue the policy, the knowledge will be imputed to the insurer and the insurer will be held to have waived the existence of such facts, and the policy will not be voided thereby. In such a case as the one under review, the jury would be authorized to find that the agent had actual knowledge of the facts prior to the issuance of the policy, and that the insurer would now be estopped from asserting that the policy was void because of such misrepresentations. See Interstate Life &c. Co. v. Bess, 35 Ga. App. 723.

6. Where an applicant for life insurance covenants in his application that the statements made to the medical examiner are true, and these statements are made a part of the policy and form the basis of the contract, any variation in them which is material, whereby the nature or extent or character of the risk is changed, will avoid the policy, whether the statement was made in good faith or willfully and fraudulently. Supreme Conclave v. Wood, 120 Ga. 328. In such a case it must be determined, first, was the representation false, and second, if false, was it made with reference to a matter material to the risk. Sovereign Camp v. Beard, 26 Ga. App. 130.

Whether questions contained in an application are material depends upon whether knowledge or ignorance of the facts sought to be elicited thereby would materially influ- [fol. 66] ence the action of the insurer.

This rule relates to actual misrepresentations of fact made in answer to questions propounded in the application for insurance, and not to the failure of the applicant to state material facts or his concealment of material facts. In the former, sections 2479 and 2480 of the Civil Code (1910) govern. In the latter, sections 2481 and 2483 control. Mutual Benefit Assn. v. Bell, 49 Ga. App. 640.

7. If, before or at the time of execution of the contract of insurance, the insurer's agent who procured the contract or who examined the insured and filled out the application had notice that the insured was not in good health, but, on the contrary, had been treated for indigestion and was in a secondary anemia condition, which might have been caused by a malignant malady, such as a cancer of the intestines, and nevertheless the policy was issued and delivered, and the premium paid to the insurer, the insurer will be presumed to have waived a condition avoiding the policy in the event of ill health of the insured at the time of the application therefor or delivery of the policy, and will be estopped from setting up that defense to an action on the policy. Knowledge of material facts upon the part of an agent of an insurance company is notice to the company. Such knowledge will be imputed to it. Where such an agent wilfully inserted in the application a false answer to a material question, he will be regarded in so doing as the agent of the insurer, and the agent's knowledge of the falsity of the answer will be imputed to the insurer. Rome Ins. Co. v. Thomas, 11 Ga. App. 539; Fair v. Metropolitan Ins. Co., 5 Ga. App. 708; Life & Cas. Co. v. Burkett, 38 Ga. App. 131; National Life & Acc. Ins. Co. v. Sneed, 40 Ga. App. 131; Wiley v. Rome Ins. Co., 12 Ga. App. 186; Metropolitan Life Ins. Co. v. McAleer, 43 Ga. App. 669.

8. The applicant for the life-insurance policy sued on in this case had a right to rely upon the agent or medical examiner of the insurer who filled out the application in behalf of the insurer, propounding to the applicant the questions therein, and where the applicant correctly answered the questions propounded to him or gave to such agent or [fol. 67] medical examiner all the facts within his knowledge concerning his previous illness and present condition of his health, he could presume that the agent would perform his duty relative to the insurer. The insured is

therefore under no duty afterwards to make an examination of the policy and of the application which is a part thereof, to ascertain upon what representations the policy purports to have been issued. Mutual Life Ins. Co. v. Brown, 34 Ga. App. 801.

9. The action was brought in this State on a policy of life insurance, which was applied for and issued in the State of New York, the insured and his beneficiary both living there at the time. However, upon the death of the insured, the beneficiary, his wife, brought his body to his old home in Georgia for burial, and remained in this State to live. The defendant denied liability solely upon the ground of false answers in the application of the insured which was attached to and made a part of the insurance policy, and set up that the law of New York rather than that of Georgia was applicable. The evidence upon the controlling issues was conflicting. The jury returned a verdict in favor of the beneficiary for principal, damages, and attorney's fees. The defendant moved for a new trial, and the plaintiff voluntarily wrote off from the verdict the damages and attorney's fees. Whether or not there was error in any of these exceptions depended upon whether the lex fori or the lex loci contractus controlled. No error of law appears in any of the special assignments of error, and the verdict in the plaintiff's favor was supported by competent evidence. In these circumstances, the trial judge did not err in overruling the defendant's motion for a new trial.

Judgment affirmed. Jenkins, P. J., and Stephens, J., concur.

Decided February 8, 1935.

[fol. 68] IN COURT OF APPEALS OF GEORGIA

JOHN HANCOCK MUTUAL LIFE INS. CO.

v.

E. K. YATES

JUDGMENT—February 8, 1935

This case came before this court upon a writ of error from the city court of Carrollton; and, after argument had,

it is considered and adjudged that the judgment of the court below be affirmed.

Jenkins, Stephens and Sutton, JJ., concur.

[fol. 69] IN COURT OF APPEALS OF GEORGIA

[Title omitted]

ORDER DENYING MOTION FOR REHEARING—February 27, 1935

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

[fol. 70] IN SUPREME COURT OF GEORGIA

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

vs.

MRS. EDNA K. YATES, Respondent

PETITION FOR WRIT OF CERTIORARI—Filed May 29, 1935

To the Honorable Justices of the Supreme Court of the State of Georgia:

Now comes the John Hancock Mutual Life Insurance Company applying for a writ of certiorari to review the decision of the Court of Appeals of the State of Georgia in the case of John Hancock Mutual Life Insurance Company, plaintiff in error, vs. Mrs. Edna K. Yates, defendant in error, number 24,220, and, within the time required by the rules of this Court, files this its petition for said writ, and for grounds thereof respectfully shows:

1

This is an action upon a policy of life insurance in the amount of $2,000.00 brought in the City Court of Carrollton, by respondent herein against petitioner herein. Verdict and judgment were rendered for respondent. Motion for new trial was made by petitioner and overruled. Ap-

peal was taken by petitioner to the Court of Appeals. The decision and judgment of the Court of Appeals complained of, affirmed the order and judgment of the trial court overruling petitioner's motion for a new trial. The decision and judgment were rendered February 8th, 1935. Within the time provided by law petitioner filed a motion for a rehearing, which motion was denied on February 27th, 1935. On March 4th, 1935, petitioner gave written notice to the Clerk of the Court of Appeals of Georgia of its intention to apply to the Supreme Court for a writ of certiorari in said case, as required by the rules of this Court.

2

The policy involved was a New York contract, having been applied for, issued, and delivered in the State of New York. The first premium was paid by Harmon Harlin Yates, the insured, in the State of New York, who was then a citizen and resident of that State. The insured died in the State of New York. Proofs of death were made in the State of New York.

[fol. 71]

The application for the insurance was in writing and print, executed by the insured, Harmon Harlin Yates, on May 2nd, 1932, and a true and correct copy of the application was physically attached to the policy, which was dated May 12, 1932. The insured entered a New York hospital on May 29, 1932, where he died of cancer on June 23, 1932. Petitioner denied liability and offered to return the premium paid, upon the ground that material misrepresentations had been made by the insured in the application.

4

Petitioner plead as affirmative defenses in the instant suit various material misrepresentations made by the insured in the application and violations of such warranties contained in the contract, as follows, to wit:

(a) That the insured had falsely stated that he was in good health.

(b) That the insured had falsely stated that he had not, within the past five years, had medical advice for any disease or disorder.

(c) That at the time of the delivery of the policy the insured was not in sound health.

(d) That the insured falsely stated that he had never had cancer or tumor.

(e) That the insured falsely stated that he had never had or been treated for indigestion.

Petitioner plead Section 58 of the Insurance Laws of New York (Laws of 1906, c. 326) as follows, to wit:

"Every policy of insurance issued or delivered within the State on or after the first day of January, 1907, by any life insurance corporation doing business within the State, shall contain the entire contract between the parties, and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, applications, or other writings unless the same are endorsed upon or attached to the policy when issued; and all statements purporting to be made by the insured shall, in the absence of fraud, be deemed representations and not warranties. Any waiver of the provisions of this section shall be void."

[fol. 72] Petitioner also plead two decisions of the Court of Appeals of New York, the highest appellate court of that State, interpreting and construing the foregoing statute, and defining and settling the rights of the parties to this suit, these decisions being as follows:

Minsker vs. John Hancock Mutual Life Insurance Company, 254 N. Y. 333, 173 N. E. 4; and

Travelers Insurance Company vs. Pomerantz, 246 N. Y. 63, 158 N. E. 21.

5

The proof of death shows that on April 7, 1932, prior to the date of the application, the insured was attended by Dr. C. L. Davidson in New York City, for a disease or disorder diagnosed as secondary anemia, and this evidence is uncontradicted. The uncontradicted evidence also shows that on April 15, April 21, April 22, and April 29, 1932, (the application having been signed on May 2, 1932) the insured was treated by Dr. C. L. Davidson at his office in New York City, New York. The proof of death executed and sworn to by Dr. J. G. Schmidt at New York City, New York,

shows that the insured died at the New York Hospital on June 23, 1932, of cancer of the intestines, and that the insured first began to show symptoms of this disease in March, 1932. This evidence is also uncontradicted. Section 58 of the Insurance Law of New York and the decisions of the Court of Appeals of New York construing said statute, as hereinbefore referred to were duly admitted in evidence at the trial.

Over petitioner's objections, respondent sought to prove a waiver against the Company, by vague and equivocal testimony that the insured informed the agent that he had had indigestion.

6

Petitioner contended in the trial court and in the Court of Appeals that the contract sued upon was a New York contract and its validity is and should be governed by the law of New York, and that on account of the foregoing material misrepresentations of fact by the insured in the written application under Section 58 of the Insurance Law of the State of New York, as construed by the decisions of the Court of Appeals of that State, petitioner was not liable on said contract and that the same was void and unenforceable, and that no parol evidence of waiver was competent [fol. 73] or admissible. The Court of Appeals of Georgia sustained the contention that under the law of New York petitioner was not liable, in the following language taken from the opinion of the Court:

"1 (b) The law of New York is that when a life insurance policy is delivered to the insured, he must read it (or have the same read to him,) and the application forming a part thereof, and if the application does not contain correct answers to the questions asked by the agent of the insurer, the insured is under a duty to so inform the insurer and have the same corrected, and when he fails to do this a recovery will not be permitted, in an action on the policy by the beneficiary against the insurer, even though the insurer's agent was informed of the facts and incorrectly recorded the answers of the applicant. Minsker v. John Hancock Mutual Life Ins. Co., 254 N. Y. 333, 173 N. E. 4; Travelers Ins. Co. v. Pomerantz, 246 N. Y. 63, 158 N. E. 21. In this case it is undisputed that the insured visited a physician four times during April, 1932, prior to his death

in June of that year, when he was suffering from indigestion, and that the application shows that the question as to whether he had received medical advice during the past five years was answered in the negative. Under the New York law, as pronounced in the above decisions, a recovery could not be had by the beneficiary on this policy."

The Court of Appeals apparently totally misunderstanding the language of the Supreme Court of Georgia, quoted in headnote 1 (a), as follows:

" 'The materiality of representations made by the insured in his application, under the laws of Georgia, is a question for the jury to decide. The manner in which this question shall be determined, being a matter affecting the remedy only, and not the validity, form, or effect of the contract, is to be controlled by the lex fori, and not by the lex loci contractus.' Massachusetts Benefit Life Asso. v. Robinson, 104 Ga. 256 (8),"

erroneously concludes that the case at bar is governed by the law of Georgia.

[fol. 74] 7

Petitioner respectfully submits that in its decision and judgment the Court of Appeals has committed the following errors:

(a) In holding and deciding that the law of Georgia is applicable to this case and in holding that

"However, under the law of this State, a different rule prevails. Our decisions hold that while an insurance policy will be avoided where the applicant therefor has made false answers as to matters material to the risk in the application for the insurance, such as to previous illness, soundness of health at that time, etc. (Southern Surety Co. v. Fortson, 44 Ga. Appl. 329); yet where the agent of the insurance company incorrectly records the answers of the applicant to questions propounded in the application as to matters material to the risk, after being informed by the applicant as to the facts, the agent's actual knowledge thereof will be imputed to the insurer and it will be held to be estopped from asserting the invalidity of the policy because of such incorrect statements as to material matters. Na-

tional Casualty Co. v. Borochoff, 45 Ga. App. 745 (1), 747 and cit.; Southern Surety Co. v. Fortson, 46 Ga. App. 265 (1, 2)."

(b) In holding and deciding that the law of Georgia is applicable to this case and in holding that

"* * * Under the facts of this case, the policy sued on was not void as a matter of law because the applicant stated that he was in good health, when he had informed the insurer's agent that he had had indigestion."

(c) In holding and deciding that the law of Georgia is applicable to this case and in holding that

"Under the facts of this case, the physician who treated the insured for indigestion having stated that he could not determine that the insured had a deadly malady, and the insured having informed the agent that he had had indigestion troubles, the opportunity of the insurer was equal with that of the insured to find out that the insured at the time [fol. 75] of the application for this insurance was in reality suffering from a deadly disease from which he died shortly after the policy was issued."

(d) In holding and deciding that the law of Georgia is applicable to this case and in holding as to this that

"The limitations upon the authority of the agent who solicited this insurance and who filled out the application were contained in the policy itself, and it has been held that such limitations apply only to matters occurring subsequently to the issuance of the policy, and that in such a case actual knowledge on the part of such agent of the insurer would be knowledge of the insurance company, and if a policy is issued with knowledge upon the part of such agent of matters or conditions which would cause the insurer to reject the application and refuse to issue the policy, the knowledge will be imputed to the insurer and the insurer will be held to have waived the existence of such facts, and the policy will not be voided thereby. In such a cause as the one under review, the jury would be authorized to find that the agent had actual knowledge of the facts prior to the issuance of the policy, and that the insurer would now be estopped from asserting that the policy was void because of such misrepre-

sentations. See Interstate Life &c. Co. v. Bess, 35 Ga. App. 723."

(e) In holding and deciding that the law of Georgia is applicable to this case and in holding as to this case that

"If, before or at the time of execution of the contract of insurance, the insurer's agent who procured the contract or who examined the insured and filled out the application had notice that the insured was not in good health, but, on the contrary, had been treated for indigestion and was in a secondary anemia condition, which might have been caused by a malignant malady, such as a cancer of the intestines, and nevertheless the policy was issued and delivered, and the premium paid to the insurer, the insurer will be presumed to have waived a condition avoiding the policy in the event of ill health of the insured at the time of the [fol. 76] application therefor or delivery of the policy, and will be estopped from setting up that defense to an action on the policy. Knowledge of material facts upon the part of an agent of an insurance company is notice to the company. Such knowledge will be imputed to it. Where such an agent wilfully inserted in the application a false answer to a material question, he will be regarded in so doing as the agent of the insurer, and the Agent's knowledge of the falsity of the answer will be imputed to the insurer. Rome Ins. Co. v. Thomas, 11 Ga. App. 539; Fair v. Metropolitan Ins. Co., 5 Ga. App. 708; Life & Cas. Co. v. Burkett, 38 Ga. App. 328; National Life & Acc. Ins. Co. v. Sneed, 40 Ga. App. 131; Wiley v. Rome Ins. Co., 12 Ga. App. 186; Metropolitan Life Ins. Co. v. McAleer, 43 Ga. App. 669."

(f) In holding and deciding that the law of Georgia is applicable to this case and in holding as to this case:

"The applicant for the life-insurance policy sued on in this case had a right to rely upon the agent or medical examiner of the insurer who filled out the application in behalf of the insurer, propounding to the applicant the questions therein, and where the applicant correctly answered the questions propounded to him or gave to such agent or medical examiner all the facts within his knowledge concerning his previous illness and present condition of his health, he could presume that the agent would perform his duty relative to the insurer. The insured is therefore un-

der no duty afterwards to make an examination of the policy and of the application which is a part thereof, to ascertain upon what representations the policy purports to have been issued. Mutual Life Ins. Co. v. Brown, 34 Ga. App. 301."

(g) In holding and deciding that there was no merit in any of the special assignments of error made by petitioner, which assignments were directly chiefly to the illegal admission in evidence by the trial court, over objection, of testimony showing the alleged waiver and estoppel on which plaintiff rests her sole right of recovery under the opinion of the Court of Appeals. The Court of Appeals in this [fol. 77] connection says:

"Whether or not there was error in any of these exceptions, depended upon whether the lex fori or the lex loci contractus controlled. No error or law appears in any of the special assignments of error, and the verdict in the plaintiff's favor was supported by competent evidence."

Petitioner contends that the competency and relevancy of such testimony is governed by the law of New York, under which law as proven, the testimony should have been excluded.

(h) In holding and deciding that under the laws of Georgia a recovery upon the contract is authorized under circumstances where by the statutes and decisions of New York a recovery would be denied. Such holding violates the full faith and credit clause of the Constitution of the United States, Article IV, Section I.

8

Movant respectfully contends that the decision and judgment of the Court of Appeals is erroneous because:

(a) It failed to give recognition to paragraph eight of the Civil Code of Georgia, as follows:

"The validity, form, and effect of all writings or contracts are determined by the laws of the place where executed."

(b) It adjudicates that petitioner was estopped to urge its defenses of misrepresentation upon the ground of notice

to, and knowledge of, its agent, where by the law of New York, the place of the contract, no such estoppel could be proved at all.

(c) It destroys a valid defense which petitioner has by the Statutes and decisions of New York, where the contract was executed, merely on account of the fact that suit was instituted against petitioner in Georgia, rather than in New York.

(d) It fails to follow and to be governed by the decisions of the highest appellate courts of New York, construing a statute of that state, governing the rights of the parties to this suit, thereby violating all precedents, as well as the full faith and credit clause of the Federal Constitution.

(e) It mistakes as a rule of evidence, the law of waiver [fol. 78] and estoppel, which is a rule of substantive law, and which affects the substantial rights of the parties to such an extent as to control the final result of the litigation, and which did control it in this case, in favor of respondents and against petitioner in clear violation of the law of New York, where the contract was made.

(f) Because no rule can truly be said to be a rule of evidence governed by the law of the forum, the effect of which is to destroy a valid defense under the law of the place where the contract was made, which converts void contracts into valid ones, which creates obligations where none existed before, and which wholly alters the contract as made, all of which is forbidden by the statutes and decisions of the State of New York, where the contract was executed.

(g) The decision and holding of the Court of Appeals to the effect that by the law of Georgia evidence of waiver and estoppel in this case was admissible, impaired and destroyed substantial defenses of petitioner, existing under the law of the State of New York, which law was by implication a part of the contract, and imposed upon petitioner a greater obligation than that agreed upon, all in violation of the guaranty against deprivation of property without due process of law, by the Fourteenth Amendment to the Constitution of the United States.

9

Petitioner respectfully submits to the Court that the questions involved in the foregoing specifications of error are of sufficient and general importance to justify the grant of the writ of certiorari in this case. Substantial Federal questions are presented, which, in petitioner's opinion, would authorize appeal to the Supreme Court of the United States. The decision as it relates to all contracts made in foreign jurisdictions, sought to be enforced in Georgia, is important and far reaching in its effects. It tends to render uncertain any contracts made in a foreign jurisdiction by any person or corporation subject to be sued in Georgia. The decision may have the effect of bringing about a reprisal by the Courts of foreign States which are asked to enforce a Georgia contract according to the law of Georgia. The decision has the effect of rendering uncertain laws which have had the uniform sanction of the Courts for centuries.

[fol. 79] 10

As an exhibit hereto, petitioner furnishes a certified copy of the entire record of the said case in the Court of Appeals, including a copy of the judgment and decision of the Court of Appeals.

11

Petitioner files concurrently herewith its written brief and argument covering the questions involved, and emphasizing the general importance of said questions.

Wherefore, petitioner respectfully prays that the writ of certiorari be granted, directed to the Court of Appeals of the State of Georgia, to review the decision in this case, and that on such review the judgment of that Court be reversed and corrected.

Smith, Smith & Bloodworth, Boykin & Boykin, Petitioner's Attorneys.

[File endorsement omitted.]

[fol. 80] IN SUPREME COURT OF GEORGIA

[Title omitted]

ORDER GRANTING CERTIORARI—June 22, 1935

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the certiorari be granted and that this order operate as the writ. The case is assigned to the trial calendar for July 15, 1935, for hearing upon the record now of file.

[fol. 81] IN SUPREME COURT OF GEORGIA

No. 10802

JOHN HANCOCK MUTUAL INSURANCE COMPANY

v.

YATES

OPINION—March 21, 1936

By the COURT:

1. As a general rule, the lex loci contractus applies only to the interpretation of contracts, and the remedy on them must be prosecuted according to the laws of the State in which the action is brought.

2. The rule just announced is not in conflict with the clause of the Federal constitution (art. 4, sec. 1) which declares that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings in every other State.

3. The Court of Appeals did not err in the opinion and judgment entered in this cause by that tribunal.

RUSSELL, Chief Justice:

The writ of certiorari was granted by this court to review the decision of the Court of Appeals in this case. 50 Ga. App. 713. The holding of the Court of Appeals, as stated in the single paragraph constituting the syllabus is:

"The action was brought in this State on a life-insurance policy applied for and issued in the State of New York, in which State both the insured and the beneficiary lived when the policy was issued. The insurance company denied liability solely on the ground of false answers in the application for insurance, attached to and made a part of the policy, and contended that the law of New York rather than that of this State was applicable. The verdict in favor of [fol. 82] the beneficiary was supported by competent evidence; and no error of law appears." It is not considered necessary that the numerous assignments of error contained in the petition for certiorari be here set out; for each and every one of them is based on the contention of the insurer that the statutes and decisions of the State of New York, rather than those of Georgia, should determine the effect of alleged false statements made in the application for insurance, in the trial of the case in the courts of this State. One of the controlling questions in the adjudication now before us is whether the remedial processes applicable in a suit in Georgia shall give way to and be superseded by the laws of New York because the contract was executed in the State of New York and intended there to be performed. Suit was brought upon the contract in the courts of Georgia. The question is whether, as to the remedial features of the action, the lex loci contractus shall prevail over the law of the forum.

In Massachusetts Benefit Life Association v. Robinson, 104 Ga. 256 (8) (30 S. E. 918, 42 L. R. A. 261), it was held: The materiality of representations made by the insured in his application, under the laws of Georgia, is a question for the jury to decide. The manner in which this question shall be determined, being a matter affecting the remedy only, and not the 'validity, form, or effect of the contract,' is to be controlled by the lex fori, and not by the lex loci contractus." Mr. Justice Cobb, delivering the unanimous opinion of this court, said: "That the lex loci controls as to the validity, form, and effect of the contract; and the lex fori as to the remedies thereon, is simply a statement of elementary law. The courts of the State of Georgia will recognize this contract as a valid contract, because it appears to be such under the laws of Massachusetts and is clearly [fol. 83] such under the laws of this State, but will give the plaintiff and the defendant respectively, for the purpose of

enforcing it on the one hand or defeating it on the other, such remedies only as are given to other persons who sue or are sued in the courts of this State. It is immaterial, therefore, for us to consider what is the law of Massachusetts in reference to the tribunal, or what part of the tribunal, that determines the materiality of the misrepresentations relied upon to defeat a contract of insurance which is the subject of a suit in this State. These are questions which each State is entitled to decide for itself, and to that end erect tribunals and lay down rules of procedure therein. The law of Georgia can declare what questions shall be passed upon by the court and what questions shall be passed upon by the jury. Persons seeking either to enforce or defeat contracts made in another State with citizens of this State, when they sue or are sued in the courts of this State, have no right to say that the tribunal fixed by its laws is not satisfactory to them and to demand a tribunal erected in accordance with the law of the State in which the contract is made. See Dicey on Conflict of Laws, 711; Story on Conflict of Laws (8th ed.), §§ 556, 557, 558. This doctrine is fully recognized in the case of Joice v. Scales, 18 Ga. 725, and Toomer v. Dickerson, 37 Ga. 428. In the latter case Judge Warner in the opinion lays down the principle clearly as follows: 'It was further insisted in the argument, that although the bond was executed in Georgia, it was intended to be, and was in fact, a South Carolina contract, and as such should be governed by the laws of the latter State in its enforcement in the courts of this State. Conceding ex gratia that it is a South Carolina contract, the plaintiff seeks to enforce it in the courts of this State. Neither the validity nor the construction of the contract is questioned. The only controversy between the parties is [fol. 84] as to the remedy upon that contract in the courts of this State. The question here is, can the creditor enforce his remedy against the security upon his South Carolina contract in the courts of this State, in accordance with our laws regulating that remedy? We give to him the same rights and remedies in our courts, for the enforcement of his contract, as we give to our own citizens; no more, no less. Mr. Justice Story states the rule correctly when he says: "Whenever a remedy is sought, it is to be administered according to the lex fori, and such a judgment is to be given as the laws of the State, where suit is brought,

authorize and allow, and not such a judgment as the laws of other states authorize or require." Story's Conflict of Laws, 954, § 572; Dela Verga v. Vienna, 20 Eng. Com. Law Rep. 387; Whittemore v. Adams, 2 Cowen's Rep. 626. When a party comes into the courts of this State to enforce his remedy upon his contract, that remedy will be enforced in accordance with the laws of this State regulating that remedy, and not according to the remedy provided for the enforcement of similar contracts in the State of South Carolina, although the contract may have been made in the latter State.' See also South Carolina Railroad Co. v. Nix, 68 Ga. 572. As it has been held by this court in the case of Phenix Ins. Co. v. Fulton, 80 Ga. 224 [4 S. E. 866], that it was proper to submit to the jury the question as to whether or not a misstatement made in the application for a policy of fire-insurance was material and would have the effect of avoiding the policy, and this being, as long as that decision stands, the established procedure to be followed in such cases, there was no error in the present case in submitting to the jury the question of the materiality of the misrepresentation alleged to have been made by the insured in his application for re-instatement."

In Johnson v. Aetna Insurance Co., 123 Ga. 404 (51 S. E. 309, 107 Am. St. R. 92), in which all the Justices concurred except Simmons, C. J., absent, this court ruled that "Limitations in an insurance policy upon the authority of the [fol. 85] agent of the company to waive the conditions of the contract of insurance are to be treated as referring to waivers made subsequently to the issuance of the policy. Mechanics Ins. Co. v. Mutual Bldg. Ass'n., 98 Ga. [262] 266, approved and reaffirmed." In the Aetna case attention was called to the conflict between the rulings in Mechanics Ins. Co. v. Mutual Bldg. Ass'n, 98 Ga. 262, and Thornton v. Travelers Ins. Co., 116 Ga. 121 (42 S. E. 287, 94 Am. St. R. 99). After thorough discussion of the subject the court held: "Our conclusion is that the ruling in the case of Mechanics Ins. Co. v. Mutual Bldg. Ass'n, 98 Ga. 262, is sound; that it is controlling of the case at bar; and that anything to the contrary in the case of Thornton v. Travelers Ins. Co., 116 Ga. 122, must yield as authority to the earlier case." Chief Justice Simmons fully concurred in the rulings in the Robinson case and in the Mechanics Ins. case, supra; and therefore it must be pre-

sumed that had he been present in the Johnson case, supra, and not upon his death-bed, the Thornton case would have been overruled.

It is insisted in the present application for certiorari that the contract here involved is governed by the lex loci contractus, and that the insurance contract was avoided by reason of false representations of the insured in his application for insurance, and that under the law it was for the court and not the jury to determine whether the alleged misrepresentations are in fact material. In support of this proposition, counsel rely upon the ruling of the Court of Appeals of New York in Minsker v. John Hancock Mutual Life Insurance Co., 254 N. Y. 333, 173 N. E. 4), in which it was held that "False answers in written application attached to life policy, with respect to medical advice and hospital treatment, as matter of law defeated recovery, though insured gave truthful oral answers." It must be borne in mind that until January 1, 1907, the courts of New York had decided that if the medical examiner of a life-[fol. 86] insurance company was truthfully told by the applicant for a policy of facts which under the terms of a policy would make it void if not noted upon it, the company could not avail itself of the defense that such facts were not stated in the policy, the underlying principles being that it would be a fraud upon the insured to accept pay for a policy which the company through its agent knew was void when delivered. In 1906 the legislature of New York passed the New York statute upon which the decision in Minsker's case, supra, was based (Laws of 1906, c. 326). This act was doubtless passed for some reason peculiar to the State of New York; for, as said by the Court of Appeals of New York in Minsker's case, "the statute applies only to life-insurance corporations, and not to other insurance companies or associations." And the reasons given for the passage of the New York statute are to be seen in Archer v. Equitable Life Assurance Society, 218 N. Y. 18, 112 N. E. 433. The explanation of the headnote in Minsker's case which we have quoted is as follows: "The answers to questions 14 and 15 as written and annexed to the policy establish as a matter of law that they are material to the risk. The plaintiff is bound by the answers as written, since the application was physically annexed to the policy of insurance, which she received from the insurer. Being a part

of the policy, the statements in the application had at least the effect of erroneous and material representations under the rule at common law;" and several New York cases were cited in support of the opinion. The 14th and 15th questions in the Minsker case are similar to those asked the insured in the case now before us. "14. Have you had any medical advice during the past five years? State * * * the names and addresses of the physicians who treated you. 15. Have you ever received or applied for treatment at any hospital, * * * cure, or other institutions?" Georgia [fol. 87] has no such law as the New York statute of 1906. By this last enactment and construction of the court of last resort of New York, the courts are to determine the materiality of all representations made by the applicant for life insurance. By the law of Georgia, the jury are to determine the materiality of such statements as may be made by the applicant for life insurance. To our minds, therefore, the only question which arises is whether the laws of New York shall be given extra-territorial effect, so as to include the geographical limits of Georgia as well as of New York. If we now concede this as to life insurance, where will it end as to other matters upon which New York may hereafter see fit to pass laws? We are of the opinion, as remarked by our predecessors, that we are not required to permit any foreign jurisdiction to overlap the domain which Georgia calls her own. To do this would destroy our right of independent existence.

The validity of a contract made in another State and sought to be enforced in this State is to be determined and controlled by the law of the State of the contract; but as to all remedies to be applied, either in the enforcement of such contract or in defeasance thereof, the law of the forum prevails. In Joice v. Scales, 18 Ga. 725, it was not only held that "As a general principle, the lex loci applies only to the interpretation of contracts, and the remedy on them must be prosecuted according to the laws of the country in which the action is brought," but the court also held that "This rule is not in conflict with the clause of the Federal constitution which declares that 'full faith and credit shall be given, in each State, to the public acts, records, and judicial proceedings in every other State;' for that applied to such records, &c., as *pleadings* and *evidence*." In Latine v. Clements, 3 Ga. 426, Judge Nisbet defined the require-

[fol. 88] ments of the Federal constitution referred to above, and in delivering the opinion of this court said: "Congress has declared what the constitution means by *full faith* and *credit;* it has enacted that the judgments of State courts shall have the same faith and credit in other States, as they have in the State where they are rendered. Act of Congress of 26 of May, 1790, ch. 11; 3 Story Com. on the Const., ch. 29, sec. 1297 to 1307. They are put upon the same footing with domestic judgments." He further said that this was a case of an administration in Georgia, and that "The administration in Georgia is necessary, because the Virginia executor has no power to act in Georgia; the two States are sovereign, and, as to each other, foreign." In Mitchell v. Cox, 28 Ga. 32, this court held: "If H. dies in Arkansas, and there is a creditor of the deceased in Georgia, and assets belonging to the estate here, and the estate of H. be insolvent, the creditor in this State is entitled to receive his pro rata share of the entire fund in both States; and neither justice nor the courtesy of States requires that the surplus be transmitted by the ancillary administrator here to the principal administrator in Arkansas." In delivering the opinion Judge Lumpkin said: "Whether Mitchell holds the note of Buffington, belonging to the estate of White E. Harden, or the proceeds which stand in the place of it, makes no difference. In the settlement of the note he was justifiable in allowing as a set-off, or part payment, the counter-claims held by Buffington against Harden. He could not have compelled payment of Buffington, except for the excess. But as to the surplus, if there be any, the courtesy between States does not, we apprehend, extend so far as to require this fund to be transmitted to the State of Arkansas, and force the creditor in this State to go there to collect his debt. * * * All that [fol. 89] justice demands is, that when an estimate is made of the whole estate of Harden—if the part coming to the claim of Cox would be less than the fund in Georgia—in that event, for the overplus to be sent by the ancillary administrator here to the principal administrator in Arkansas. We are not prepared to say that even this is not going too far."

Following this quotation the entire membership of this court, in Owsley v. Bowden, 161 Ga. 884, 891 (132 S. E. 70, 44 A. L. R. 795), spoke as follows: "But it is said that

under the law of Alabama the claims of all the plaintiffs are barred, and for this reason, regardless of anything else, the petition is demurrable and should be dismissed. If it be conceded that the laws of Alabama governing the distribution of estates should govern in the distribution of the Georgia property owned by an Alabama testator, it does not, in our opinion, follow that statutes of limitations adopted in Alabama should prevail over Georgia statutes upon the same subject. They are purely remedial; and it has always been held that the law of the forum determines the remedy and determines when a claim may be enforced in the courts of that State." Citing Thomas v. Clarkson, 125 Ga. 72 (54 S. E. 77, 6 L. R. A. (N. S.) 658), and Latine v. Clements, 3 Ga. 426; also quoting from Wilson v. Hartford Fire Insurance Co., 164 Fed. 817 (90 C. C. A. 593, 19 L. R. A. (N. S.) 553), in which the opinion was delivered by Judge Sanborn (with whom Judge Van Devanter, later a Justice of the Supreme Court of the United States, presided) as follows: "The property of the estate which is situated in Kansas is not controlled nor is its administration or distribution governed by the laws of the domicile of the testator. The laws of Illinois have no extra-territorial force, and they are powerless in the State of Kansas. The property of the estate of the testator in that State is subject to and it must be administered and distributed in accordance with the laws of the State of its [fol. 90] situs. Under the statutes of Kansas the property of deceased persons in that State, whether they were residents or non-residents, is subject to the payment of their debts due to citizens of other States to the same extent as it is to the payment of those owing to its own citizens. * * * The effect of this legislation is that the application of the Kansas property of a deceased non-resident of that State, whether testate or intestate, to the payment of his debts, is governed exclusively by the laws of Kansas, and the laws of his domicile can have no effect upon any part of that property until those debts have been ascertained and paid."

In the unanimous opinion of this court in Joice v. Scales, 18 Ga., heretofore quoted, it was said: "We may safely assume, as a general principle, that the lex loci applies only to the interpretation of contracts [and] to their con-

struction, and that the remedy on them must be prosecuted according to the laws of the country in which the action is brought. This rule is approved by our reason; and it seems to be now regarded, generally, as the correct rule in the courts of England and of the United States. It has the sanction of learned jurists in other countries, as is shown by Judge Story in his Conflict of Laws, §§ 573, 574. (See also 2 Kent's Com. 462. Whittemore vs. Adams, 2 Cow. 620). * * * The rule we lay down is founded upon plain principles of reason and propriety. A different principle would give to the laws of a State extra-territorial operation, causing those of one State to control in another, in the enforcement of remedies." In response to the argument now made in this case, that "Full faith and credit should be given in each State to the public acts, records, and judicial proceedings in every other State," the court in the Joice case held that the rule just laid down was not in conflict with that constitutional provision, and that a construction which would give the same effect to a foreign judgment [fol. 91] as our own "would, indeed, be to give the laws of one State complete operation in another—would be to make a judgment in one State bind property in another." In support of the ruling of the Supreme Court in this case, Phelps v. Holker, 1 Dall. 261, James v. Allen, 1 Dall. 188, and Mills v. Duryee, 7 Cranch, 481, are cited. See also Obear v. First National Bank of Birmingham, 97 Ga. 587 (25 S. E. 335, 33 L. R. A. 384). The Court of Appeals did not err in affirming the judgment overruling the motion for new trial.

Judgment affirmed. All the Justices concur, except Gilbert and Hutcheson, JJ., who dissent, and Beck, P. J., absent for providential cause.

IN SUPREME COURT OF GEORGIA

DISSENTING OPINION

GILBERT, Justice, dissenting:

This action upon a policy of life insurance in the amount of $2000 was brought in the city court of Carrollton by Mrs. Edna K. Yates against John Hancock Mutual Life Insur-

ance Company. Verdict and judgment were rendered for the plaintiff. Motion for a new trial was made by the insurance company, and overruled. The case was taken to the Court of Appeals, where the judgment of the trial court was affirmed. Motion for a rehearing was denied. The case is now before this court on certiorari. The policy involved was a New York contract, having been applied for, issued, and delivered in the State of New York. The first premium was paid by the insured, Harmon Harlin Yates, in the State of New York, he being then a citizen and resident of that State. The insured died in the State of New York, and proofs of death were made in that State. The application for insurance was in writing and print, executed by the insured on May 2, 1932, and a copy of the application was physically attached to the policy, which was dated May 12, 1932. The insured entered a New York [fol. 92] hospital, on May 29, 1932, where he died of cancer on June 23, 1932. The insurance company denied liability, and offered to return the premium paid, upon the ground that material misrepresentations had been made by the insured in his application for insurance, as follows: (a) That the insured had falsely stated that he was in good health. (b) That he had falsely stated that he had not, within the past five years, had medical advice for any disease or disorder. (c) That at the time of the delivery of the policy he was not in sound health. (d) That he falsely stated that he had never had cancer or tumor. (e) That he had falsely stated that he had never had or been treated for indigestion. The insurance company also pleaded and introduced in evidence section 58 of the insurance laws of New York (Laws of 1906, c. 326), hereinafter quoted; also two decisions of the court of last resort of New York, interpreting and construing the said statute and which are referred to later herein. The proof of death shows that in April, 1932, prior to the date of the application, the insured was treated by a physician in New York City for a disease or disorder diagnosed as secondary anemia; and this evidence is uncontradicted. He was also treated by the same doctor on four occasions at the office of the same doctor. The proof of death shows that he died at the New York hospital on June 23, 1932, of cancer of the intestine, and that the insured first began to show symptoms of this disease in March, 1932. Over objection

of the company the plaintiff sought to prove a waiver against the company, by certain testimony of the insured's wife that he had informed the agent that he had indigestion. The insurer contends that the contract sued on was a New York contract, that its validity is and should be governed by the law of New York, that on account of the material misrepresentations as above set forth and as made in his [fol. 93] written application the company was not liable on the contract, that the same was void and unenforceable, and that no parol evidence of waiver was competent or admissible. The Georgia Court of Appeals held that under the New York law the company was not liable; but it also held that under the law of Georgia, where the agent of the insurance company incorrectly records the answers of the applicant to questions propounded in the application as to matters material to the risk, after being informed by the applicant as to the facts, the agent's actual knowledge will be imputed to the insurer, and it will be held to be estopped from asserting the invalidity of the policy because of such incorrect statements as to material matters. The Georgia Court of Appeals also held that "The materiality of representations made by the insured in his application, under the laws of Georgia, is a question for the jury to decide. The manner in which this question shall be determined, being a matter affecting the remedy only, and not the validity, form, or effect of the contract, is to be controlled by the lex fori, and not by the lex loci contractus." The insurance company contends that the Court of Appeals erred in holding as above stated; and numerous assignments of errors are contained in the petition for certiorari, but it is not necessary to set them out in detail as they are all based on the contention that the statutes and decisions of the State of New York, rather than those of Georgia, should determine the effect of alleged false statements made in the application for insurance, the case being tried in the courts of this State.

"The validity, form, and effect of all writings or contracts are determined by the laws of the place where executed." Code of 1933, § 102-108. It is not disputed, and it was so held in the opinion of the Court of Appeals, that the law just quoted applies to the interpretation of the contract involved in the present case. But it is contended [fol. 94] by the plaintiff and sustained by the Court of Ap-

peals that as to the remedy for enforcing a right under the contract the lex fori, in this case the law of Georgia, should govern. With these abstract principles of law I readily concur; but as to the application of the lex fori in the present case I must respectfully differ. The basis of my dissent is that before there can be an application of the lex fori there must exist an antecedent right which is capable of enforcement by what is termed adjective or remedial law. The lex fori can apply only with reference to remedies. The lex loci contractus applies with reference to substantive rights. Or, as is often stated, "Substantive law creates, defines and regulates rights, as opposed to adjective law, which prescribes the method of enforcing rights or obtaining redress for their invasion." 7 Words and Phrases (3d Series), 249. In the present case the substantive right, if any, in the plaintiff would be the right to recover on the policy of insurance which was issued to her deceased husband and in which she was made the beneficiary. In other words, is the contract of insurance valid, or is it void for reasons stated? The adjective law would be that which prescribes the suitable procedure and remedies to enforce such substantive right as may exist at law. Consequently it is necessary first to determine whether the insurance company has by contract placed itself in such a position that it is liable to the plaintiff. What do we find? The law of New York is that "Every policy of insurance issued or delivered within the State on or after the first day of January, 1907, by any life-insurance corporation doing business within the State, shall contain the entire contract between the parties, and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, applications, or other writings, unless the same are endorsed upon or attached to the policy when issued; and all [fol. 95] statements purporting to be made by the insured shall, in the absence of fraud, be deemed representations and not warranties. Any waiver of the provisions of this section shall be void." It has been held as to the substantive law, in Minsker v. John Hancock Life Ins. Co., 254 N. Y. 333 (173 N. E. 4), and Travelers Ins. Co. v. Pomerantz, 246 N. Y. 63 (158 N. E. 21), that "The law of New York is that when a life-insurance policy is delivered to the insured, he must read it (or have the same read to him), and the application forming a part thereof; and if the ap-

plication does not contain correct answers to the questions asked by the agent of the insurer, the insured is under a duty to so inform the insurer and have the same corrected, and when he fails to do this *a recovery will not be permitted* in an action on the policy by the beneficiary against the insurer, *even though the insurer's agent was informed of the facts* and incorrectly recorded the answers of the applicant." (Italics mine.) The Court of Appeals recognized this substantive law of New York, and further held: "In this case it is undisputed that the insured visited a physician four times during April, 1932, prior to his death in June of that year, when he was suffering from indigestion, and that the application shows that the question as to whether he had received medical advice during the past five years was answered in the negative. Under the New York law, as pronounced in the above decisions, a recovery could not be had by the beneficiary on this policy." The above statement and the principle have not been questioned by this court. It necessarily follows that, the plaintiff having no substantive right to enforce, the question of remedial right does not arise. It seems to me that to assert to the contrary would be to contend for a legal fallacy. If the plaintiff has a right under the New York law, she has that [fol. 96] right in Georgia. If under the law of New York the plaintiff has no right, she has no right in Georgia. In this instance both contracting parties resided in New York, the contract was signed in New York, the contract was delivered in New York, and the insured died in New York. From the premise above stated, it follows, not only as a matter of logic but of law, that if the plaintiff has no right she has no remedy.

But while recognizing the New York law as controlling the validity of the contract, and recognizing the lack of substantive right in the plaintiff under the New York law, the position taken by the majority seems to be tantamount to saying: No right exists in New York, but we are finding the plaintiff a right in Georgia by resorting to an adjective law which provides that in Georgia a jury may pass upon the materiality of misrepresentations; and if it found that such misrepresentations are not material, the plaintiff will have a right to recover, notwithstanding that under a proper construction of the policy he would have no right either in New York or in Georgia. It seems to me that such a ruling

would be illogical and unsupported by reason. The court would be overleaping settled law in an effort to give a right which otherwise can not be seriously insisted upon. The basis of the view of the majority of the court, of the alleged right of the plaintiff to maintain an action in Georgia in the present case, seems to be the decision in Massachusetts Benefit Life Association v. Robinson, 104 Ga. 256 (supra). It will be found upon examination, however, that the cited case is not authority for the position taken, and that there is nothing in that case contrary to the fundamental requirement that for the application of adjective law there must exist an antecedent right under substantive law. Quite consistently a defendant may in some case be held to the [fol. 97] principle of lex fori while at the same time being afforded the benefit of lex loci contractus. But the order of the application of the two is a very vital factor. As to the right of the plaintiff to recover, it must first be determined how he stands when the lex loci contractus is also put upon him. If he is found without any substantive right, the inquiry necessarily ends. If, on the contrary, he is found to have a substantive right, then and then only does the lex fori come into operation. In other words, the latter is subordinate to the first; or, simply stated, no right, no remedy, the converse of the legal maxim, "Ubi jus ibi remedium," where there is a right there is a remedy. There is nothing in the Massachusetts Benefit Life Association case which suggests that the lex fori could be applied so far as to permit a holding that a life-insurance company, under a contract executed in New York, may be liable in Georgia notwithstanding that the contract expressly provides for non-liability upon mere false statements of the insured in reference to his physical condition and without reference to the materiality of the misrepresentations. A void contract can not legally be enforced anywhere. If the New York law and the terms of the policy had not made the policy void under the circumstances of the case, certainly the lex fori would govern in an investigation of the materiality of the misrepresentations; and in Georgia, in case of conflicting evidence on that point, the question would be decided by a jury. Mr. Justice Cobb, in the Massachusetts case, stood fast to the principle that a substantive right in a party under a contract executed in another State must be protected in Georgia. His remarks as to the lex

fori were in reference to the question whether or not the policy should be held to be reinstated, not with reference to any statements made in the antecedent application for [fol. 98] insurance, but with reference to the application for reinstatement. The right of the plaintiff being protected because of the clause which made the policy incontestable after three years, the statements made in the application for reinstatement were immaterial, not with reference to their own falsity, but as to whether they should overthrow a substantive right which had accrued to the insured by reason of three years having elapsed and the policy being thereby rendered incontestable. The lex fori was resorted to only on the question of reinstatement, and because Mr. Justice Cobb regarded it as a procedural phase of the case; and whether or not this court agree with him as to it being procedural, it is inescapable that the lex fori was applied on the sole theory that the inquiry was procedural or remedial. It necessarily follows that what was said is not applicable to the facts of the present case, where the defense of the insurance company is not barred, but where the right of the plaintiff is barred, by the terms of the contract. On the other hand, if it be said that he was laying down a general principle that he meant to be applied to the question of materiality of misrepresentations in an antecedent application for a policy of insurance, the non-liability under which could be set up, as distinguished from the case of the defendant in the Massachusetts Benefit Life Association case under a policy which was held incontestable by its terms, then what was said is not binding upon this court and is mere obiter.

It is stated in the majority opinion that "Georgia has no such law as the New York statute of 1906. By this last enactment and construction of the court of last resort of New York, the courts are to determine the materiality of all representations made by the applicant for life insurance. By the law of Georgia, the jury are to determine the materiality of such statements as may be made by the appli- [fol. 99] cant for life insurance." It must be remembered that the New York statute was not passed with reference to procedural rights such as are involved in the language just quoted. It was to afford a substantive right to life-insurance companies, by providing that the policy shall contain the entire contract between the parties, thus elim-

inating any oral statements not reduced to writing and incorporated in the policy. Obviously this is independent of any question whether a jury or the court should pass upon the question of materiality of misrepresentations. It is not, by itself or in connection with the two New York decisions hereinbefore mentioned, a subject-matter of comparison with the law of Georgia that a jury shall, where the evidence is conflicting, pass upon such a question. Being so, I do not think there is involved any question of whether the law of New York may be said to be given extra-territorial effect as to adjective or remedial law. As to a contract executed in another State, it is provided in the Code of 1933, § 102-108, that "The validity, form, and effect of all writings or contracts are determined by the laws of the place where executed." The provisions of the New York law above referred to relate to "the validity, form, and effect" of the contract of insurance under consideration, and therefore to such as is comprehended in the Code section just quoted. For the reasons above given I am of the opinion that the judgment of the Court of Appeals should be reversed.

But, aside from the reasons above given, I am impelled by other considerations to dissent from the majority opinion. It is provided in the Code of 1933, § 56-820; 56-821. "Every application for insurance shall be made in the utmost good faith, and the representations contained in such application shall be considered as covenanted to be true by the applicant. Any verbal or written representa-[fol. 100] tion of facts by the insured to induce the acceptance of the risk, if material, must be true, or the policy shall be void. If, however, the party shall have no knowledge, but shall state on the representation of others, bona fide, and shall so inform the insurer, the falsity of the information shall not void the policy." In § 56-822 it is provided: "A failure to state a material fact, if not done fraudulently, shall not void the contract; but the wilful concealment of such a fact, which would enhance the risk, shall void the policy." In Phillips v. New York Life Insurance Co., 173 Ga. 135, (159 S. E. 696), it was said: "'Where an applicant for life insurance willfully conceals from the insurer the fact of a previous illness, such concealment will avoid the policy if the disease was of such a character as to enhance the risk.' Aetna Life Insurance

Co. v. Conway, 11 Ga. App. 557 (75 S. E. 915). 'A material representation in an application for life insurance is one that would influence a prudent insurer in determining whether or not to accept the risk, or in fixing the amount of the premium in the event of such acceptance.' Lee v. Insurance Co., 158 Ga. 517 (123 S. E. 737). It was held in Mutual Life Insurance Co. v. Bolton, 22 Ga. App. 566 (96 S. E. 442): 'Representations made in an application for insurance which is attached to and made a part of the policy are considered as covenanted to be true by the applicant, and the policy will be voided by any variation which changes the nature, extent, or character of the risk. Any material representation of facts by the assured, to induce the acceptance of the risk, will void the policy if untrue; and while failure to state a material fact will not void a policy unless such failure be fraudulent, a willful concealment of such fact, which would enhance the risk, will void the policy.' " It is beyond peradventure that, under the evidence, the insured was bound to know of his physical ill health, and that he sought and obtained medical advice, all [fol. 101] of which facts were denied in his antecedent application for the policy of insurance of which it was expressly made a part. Neither can it be reasonably contended that a man of his apparently good education, an executive of a tire company, did not know that such facts were very material to the risk assumed by the company. The truth and materiality of representations are generally questions for the jury; but where all the testimony relating to a question of fact excludes every reasonable inference but one, the issue becomes an issue of law for determination by the court. Empire Life Insurance Co. v. Jones, 14 Ga. App. 647 (3) (82 S. E. 62); Mutual Life Insurance Co. v. Bolton, supra; Phillips v. New York Life Ins. Co., supra; New York Life Insurance Co. v. Hollis, 177 Ga. 805 (2) 807 (171 S. E. 288). In the last case cited it was held by six Justices: "Under the evidence a finding was demanded that the reinstatement of the policy which had lapsed for non-payment of a premium should be set aside and canceled, because obtained by untrue answers to questions contained in the application, and because the misrepresentation was as to material facts." It was said, as to a misrepresentation: "If she had had merely headaches and had been treated for those headaches by a physician, the insurance company

should have been informed of the fact by a truthful answer to the question contained in her application. A misrepresentation as to whether the insured had been attended by a physician, whether for a headache or other ailment, was material, because the company would, upon being informed that she had been treated many times for headache, have had the right to investigate and ascertain for itself how serious was the ailment for which she had been treated." In the same way, the insurance company in the present case had the right to know of the indigestion for which the insured had been treated, and to investigate and determine what other or more serious ailment might have been the [fol. 102] cause of it. The evidence in this case demanded a finding that the misrepresentations were material; and the court should have so found, and erred in referring the matter to the jury.

But it is urged that the wife testified that she was present when the application was taken and signed, and that she heard the insured inform the agent of the company of the fact that he had visited a physician because of indigestion; and it is contended that notice to the agent was notice to the insurance company. In considering the admissibility of such testimony, I do not think that it is really pertinent to consider the principle of lex fori. It is one thing to resort to that principle when there is a case before the court which admits of explanation of a written contract, and quite another to invoke it when the contract by its express terms shows a vested right in the insurance company. That right in the present case was to be free from liability on the basis of the contract. I can not, therefore, concur in any decision which deprives a party of such a right by an unwarranted resort to the principle of lex fori. Having such a vested right, the insurance company had a *substantive* right which this State is bound to protect. It was well stated long ago by Chief Justice Taney, in Bronson v. Kinzie, 1 How. 311, 315, 317 (11 L. Ed. 143): "Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution. * * * It was to maintain the integrity of contracts, and to secure their faithful

execution throughout this Union, by placing them under the protection of the Constitution of the United States. And it would but ill become this court, under any circumstances, to depart from the plain meaning of the words used, and [fol. 103] to sanction a distinction between the right and the remedy, which would render this provision illusory and nugatory; mere words of form, affording no protection, and producing no practical result." What could be the purpose of the testimony of the insured's wife but to seek to overcome this constitutional protection of the vested right in the insurance company, to wit, the right to be free from liability in case the insured made any untrue statements in the written application and failed to call the attention of the company to the untruths recorded by the agent when the policy was delivered to the insured? The introduction of the wife's testimony was unwarranted and plainly for the purpose of bringing about some sort of implied waiver or estoppel against the insurer. It is in violation of the constitutional provision as to each State giving full faith and credit to the public acts, records, and judicial proceedings in every other State as provided in article IV, sec. 1, of the Federal constitution. "A State statute is a public act within the meaning of the full faith and credit clause of the Federal constitution." Bradford Electric Light Co. v. Clapper, 286 U. S. 145 (52 Sup. Ct. 571, 76 L. Ed. 1026, 82 A. L. R. 696).

The New York statute which vests the insurance company with the right to be free from liability under the circumstances of this case is, therefore, a public act which this State is bound to protect in its judicial determinations. To permit the wife of the insured to introduce oral testimony to negative the written statements made in the application for insurance would be subversive of the principle above discussed. Nor, under the contract, would notice to the agent bind the principal even if it were true that the applicant had told the agent that he had been troubled with indigestion. The insurance law became a part of the contract of insurance, and, as said above, in sec. 58, c. 326, of [fol. 104] the law of New York it was provided that the policy shall contain the entire contract. In Minkser v. John Hancock Mutual Life Insurance Co., supra, it was held, in reference to the aforesaid act, that a recovery would not be permitted on the ground that the medical examiner in-

correctly stated the applicant's answers, or because the insured was unable to read or neglected to read the policy. The agent who took the application likewise had no authority to waive any of the conditions of the policy, and any statement to the agent contrary to those in the written application would not bind the company. As to the limitations of an agent's power, as decided by this court, see Hutson v. Prudential Insurance Co., 122 Ga. 847 (50 S. E. 1000); Vardeman v. Penn Mutual Life Insurance Co., 125 Ga. 117 (54 S. E. 66, 5 Ann. Cas. 221); Bank of Commerce v. N. Y. Life Insurance Co., 125 Ga. 552 (54 S. E. 643); Rome Industrial Insurance Co. v. Eidson, 138 Ga. 592 (75 S. E. 657), and cit.; Reliance Life Ins. Co. v. Hightower, 148 Ga. 843, 845 (98 S. E. 469); New York Life Insurance Co. v. Patten, 151 Ga. 185 (106 S. E. 183); Davis v. Metropolitan Life Ins. Co., 161 Ga. 568 (131 S. E. 490); Darby v. Mutual Benefit Life Insurance Co., 165 Ga. 516 (141 S. E. 410). Eliminating the testimony of the wife of the insured, there was no conflict in the evidence, and it demanded a finding that the insured made false and fraudulent statements in his written application, and that they were very material to the risk assumed. For the reasons above given, I am of the opinion that the judgment of the Court of Appeals should be reversed.

There is nothing in Mechanics Ins. Co. v. Mutual Asso., 98 Ga. 262, or Johnson v. Aetna Insurance Co., 123 Ga. 404, 406 (supra), which in any way conflicts with the principles contended for in this dissent. In the Johnson case it was expressly recognized that "It has also been held that where a policy contained a stipulation identical with the one in [fol. 105] the present case, limiting the power of any agent of the company to make a waiver for the company, and providing that any waiver, to be valid, must be endorsed in writing on the policy, the insured can not in an action on the policy excuse his failure to comply with the conditions of the contract." (Citing.) Mr. Justice Hutcheson concurs in this dissent.

[fol. 106] IN SUPREME COURT OF GEORGIA

10802

JOHN HANCOCK MUTUAL LIFE INS. CO.

v.

E. K. YATES

JUDGMENT—March 21, 1936

This case came before this court by writ of certiorari from the Court of Appeals of Georgia; and, after argument had, it is considered and adjudged that the judgment of the Court of Appeals be affirmed, and that such further action be taken by the Court of Appeals as may be necessary to give effect to the opinion filed in the case. All the Justices concur, except Gilbert, and Hutcheson, JJ., who dissent. Beck, P. J., absent for providential cause. Bill of costs, $15.

[fol. 107] IN THE SUPREME COURT OF THE STATE OF GEORGIA

Number 10802

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, Petitioner,

vs.

MRS. EDNA K. YATES, Respondent

RECITAL AS TO MOTION FOR REHEARING

Motion for Rehearing by Petitioner.
Filed in office March 28, 1936.

K. C. Bleckley, C. S. C. Ga.

[fol. 108] IN SUPREME COURT OF GEORGIA

[Title omitted]

ORDER DENYING MOTION FOR REHEARING—March 31, 1936

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

[fol. 109] IN SUPREME COURT OF GEORGIA

[Title omitted]

MOTION FOR ORDER STAYING MANDATE—Filed April 6, 1936

Now comes the petitioner, John Hancock Mutual Life Insurance Company, and moves the Court to enter an order staying and withholding the mandate in this case because it is the bona fide intention of petitioner to make proper application to the Supreme Court of the United States for the writ of certiorari in this case, within the next ninety days, and in support hereof petitioner attaches the professional statement of its counsel, Alex W. Smith, Jr., of Atlanta, Georgia.

I hereby certify that it is the bona fide intention of petitioner, John Hancock Mutual Life Insurance Company, to remove this case to the Supreme Court of the United States by appeal, or to make application to said court for a writ of certiorari, or do both, as he may be advised, within the next ninety days, and that I believe there is merit in petitioner's case and that the judgment of the Supreme Court of Georgia ought to be reversed by the Supreme Court of the United States.

Alex W. Smith, Jr., Counsel for John Hancock Mutual Life Insurance Company, Petitioner.

[fol. 110] IN SUPREME COURT OF GEORGIA

[Title omitted]

PETITION FOR STAY OF EXECUTION—Filed April 6, 1936

Petition of John Hancock Mutual Life Insurance Company, petitioner above named, for an order staying the execution and enforcement of the judgment of the City Court of Carrollton, Georgia, to enable said petitioner to apply for and obtain writ of certiorari from the Supreme Court.

To Hon. Richard B. Russell, Chief Justice of the Supreme Court of Georgia:

Your petitioner John Hancock Mutual Life Insurance Company respectfully presents this, its application for an

order staying the execution and enforcement of the judgment of the City Court of Carrollton, Georgia, rendered in the above cause on the 14th day of March, 1934, under the provisions of Section 350 of Title 28 of the United States Code, to enable said petitioner to apply for and obtain a writ of certiorari from the Supreme Court of the United States.

This the 6 day of April, 1936.

Smith, Smith & Bloodworth, Counsel for Petitioner.
Alex W. Smith, Jr., of Counsel.

[File endorsement omitted.]

[fol. 111] IN SUPREME COURT OF GEORGIA

[Title omitted]

ORDER STAYING EXECUTION OF JUDGMENT, ETC.—Filed April 6, 1936

Upon application of John Hancock Mutual Life Insurance Company in the above entitled cause, by Alex W. Smith, Jr., its counsel, for a stay of execution of the judgment of the City Court of Carrollton, Georgia, to enable said petitioner to apply for and obtain a writ of certiorari from the Supreme Court of the United States, and good cause therefor being shown, it is ordered that the execution and enforcement of said judgment be and it hereby is stayed until the Supreme Court of the United States finally passes upon the petition to be made thereto on behalf of the John Hancock Mutual Life Insurance Company for a writ of certiorari, on condition that said John Hancock Mutual Life Insurance Company gives good and sufficient security in the sum of $1,000.00 to be approved by the Honorable Richard B. Russell, Chief Justice of the Supreme Court of Georgia, conditioned that if the said John Hancock Mutual Life Insurance Company fails to make application for such writ of certiorari within the time limited therefor, or fails to obtain an order granting its application, or fails to make its plea good in the Supreme Court of the United States, it shall answer for all damages and costs which the said Mrs. Edna K. Yates, respondent, may sustain by reason of said stay.

It is further ordered that the mandate of this Court be and the same is hereby stayed pending petitioner's petition in the Supreme Court of the United States for a writ of certiorari to this Court, provided said petition for certiorari is presented in the Supreme Court within the time required by law.

This 6th day of April, 1936.

Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia.

[File endorsement omitted.]

[fols. 112-116] Bond on stay for $1,000.00, approved and filed April 7, 1936, omitted in printing.

[fol. 117] IN SUPREME COURT OF GEORGIA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed May 12, 1936

To the Honorable K. C. Bleckley, Clerk of the Supreme Court of the State of Georgia:

In compliance with Rule Ten of the Supreme Court of the United States, the petitioner hereby indicates the portions of the record to be incorporated into the transcript of record on applying for the writ of certiorari in this case:

1. Notice of intention to certiorari, R. 1.
2. Bill of exceptions, certificate and service, R. 2, 3, 4 & 5.
3. Original petition, R. 6, 7, 8 & 9.
4. Defendant's answer, R. 10, 11, 12, 13, 14, 15, 16.
5. Plaintiff's Amended Petition, beginning R. 16, and ending at top of R. 19, with "countersigned—P. N. Erskine, Secretary."
6. Application for Insurance, beginning R. 33, 34, 35, 36, and ending with "Harmon Harlin Yates" on middle of R. 37.
7. Amended answer of Defendant, R. 38, 39, 40, 41, 42.
8. Order of Court allowing amendment, R. 42.

9. Amended answer of Defendant, R. 43, 44.

10. Order of Court allowing amendment, R. 44.

11. Verdict of Jury, R. 45.

12. Judgment of the Court, R. 45.

13. Motion for new trial, order of Court thereon, and service, R. 46, 47.

14. Amendment to Motion for New Trial, R. 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, including certificate of trial Court on R. 62.

[fol. 118] 15. Testimony of Mrs. Edna K. Yates, R. 63, 64, 65, 66, 67, 68.

16. Testimony of Mrs. Edna K. Yates, Recalled, R. 69, 70.

17. Testimony of Dr. Chester L. Davidson, R. 76, 77, 78 & 79.

18. Testimony of Mrs. Edna K. Yates, recalled, and agreement of counsel that Mrs. Yates and her husband moved from East Orange, N. J., to Jamaica, Long Island, in March, 1932, R. 99.

19. Documentary Evidence, R. 99.

20. Defendant's Exhibit Nos. 2, 3, 4, 5 & 6, R. 100.

21. Defendant's Exhibit No. 7, R. 101.

22. Stipulation of counsel, R. 101.

23. Defendant's Exhibit No. 2, R. 104.

24. Defendant's Exhibit No. 3, R. 105.

25. Defendant's Exhibit No. 4, R. 106.

26. Defendant's Exhibit, No. 5, R. 107.

27. Defendant's Exhibit No. 6, R. 107, 108, 109.

28. Defendant's Exhibit No. 7, R. 109, 110.

29. Order of Court approving Brief of Evidence, R. 113.

30. Order overruling defendant's motion for new trial, R. 130.

31. Opinion of Court of Appeals, R. 132, 133, 134, 135, 136, 137, 138, 139 & 140.

32. Judgment of Court of Appeals, R. 141.

33. Judgment Court of Appeals on Motion for Rehearing, R. 158.

34. Petition for Certiorari.

35. Judgment of Supreme Court granting Certiorari to Court of Appeals.

36. Judgment and Opinion of Supreme Court affirming judgment of Court of Appeals.

37. Entry of filing of Motion for Rehearing in Supreme Court.

38. Judgment of Supreme Court denying Motion for Rehearing.

39. This Præcipe with the respondent's acknowledgment thereof.

Smith, Smith & Bloodworth, Attorneys for John Hancock Mutual Life Insurance Company, Petitioner.

[File endorsement omitted.]

[fol. 119] IN SUPREME COURT OF GEORGIA

[Title omitted]

NOTICE OF PRÆCIPE—Filed May 14, 1936

To Messrs. Smith & Millican, Attorneys for Respondent:

Please take notice that on the 12th day of May, 1936, the undersigned filed with the clerk of this Court a præcipe for the record to be transmitted to the Supreme Court of the United States on applying for the writ of certiorari in the above cause, a copy of which præcipe is herewith served upon you.

Dated this 12th day of May, 1936.

Smith, Smith & Bloodworth, Boykin & Boykin, Attorneys for John Hancock Mutual Life Insurance Company, Petitioner.

Service of the within and foregoing Præcipe together with notice of the date of filing in the Supreme Court of Georgia is hereby acknowledged. Copy received. This 13 day of May, 1936.

Smith & Millican, Attorneys of Record for Mrs. Edna K. Yates, Respondent.

[File endorsement omitted.]

[fol. 120] IN SUPREME COURT OF GEORGIA

[Title omitted]

PRÆCIPE FOR ADDITIONAL PORTIONS OF RECORD—Filed May 18, 1936

To the Honorable K. C. Bleckley, Clerk of the Supreme Court of the State of Georgia:

Comes now Mrs. Edna K. Yates, respondent in the above styled case and in answer to the designation of the parts of record to be printed in said case filed by plaintiff in error and served on defendant in error on May 13, 1936, says:

There should be added to the record specified the following:

(1) Testimony of Frederick C. Tanner, at Record, bottom page 88 and page 89.

(2) The cross-examination of the witness, Dr. John F. Denton, at Record, pages 93 and 94.

(3) The direct testimony of C. S. Engle, at Record, pages 95, 96, and 97.

(4) Exhibit 2 of plaintiff below, being a letter from L. C. Rickmeyer to Herman Sulzer, at Record, page 102.

(5) This response.

Edgar Watkins, Attorney for Respondent, Mrs. Edna K. Yates. Watkins, Grant & Watkins, 1025 Citizens & Southern National Bank Building, Atlanta, Georgia.

Service of the foregoing response to the præcipe of plaintiff in error is hereby acknowledged and copy received. This the 18th day of May, 1936.

Smith, Smith & Bloodworth, Attorneys for Plaintiff in Error.

[File endorsement omitted.]

[fol. 121] . . . . . .

Testimony of FREDERICK C. TANNER:

. . . . . .

Assuming that, in his application, attached to the policy in suit and made part thereof, the Insured answered "yes" to the question "are you now in good health so far as you know or believe." Assuming that at the time of signing the application and answering the question just referred to, the insured was not in good health and knew that he was not in good health, under the law of the State of New York if there was such a misstatement that would void the policy. In Fay v. Metropolitan Life Insurance Company, 119 Miscellaneous Reports, 715, Mr. Justice Guy went even further and after discussing the effect of Section 58 of the Insurance Law of the State of New York, held that in that case, even though the Insured made a bona fide mis-statement that he was not suffering from cancer from which he died within eight months, it was so material a mis-statement that as a matter of law, though not a warranty, it voided the policy. The decisions generally hold that the Insurer is entitled to the best answer that the Insured is capable of making in response to such question. That is, that it must be a full disclosure in good faith.

The plaintiff, as I have indicated, is bound by these proofs of death unless and until explained away. The testimony of the physician that you referred to, who made the certificate, Defendant's Exhibit B, for identification, has not been read to me but it is a question for the Trial Court to determine, where the admissions made in the proofs of death have been explained away, that was a question of fact which could not be determined by an expert who has not heard the testimony.

It seems to me the Court or the Jury, if the case is tried before a jury, are ultimately the finders of the fact whether or not the admissions in the proofs of death have been explained away.

. . . . . .

[fol. 122] DOCTOR JOHN F. DENTON:

* * * * * * *

Cross-examination.

By Mr. J. L. Smith:

I said I lived in Atlanta, yes, sir. I am not the physician for the John Hancock Mutual Life Insurance Company. I am not connected with it in any way whatsoever. I was not subpœnæd to come down here, I was just asked to come. I was asked to come by Mr. Smith. A person could have secondary anemia from other causes besides cancer. He could have that from toxemic poisoning. As to whether he could have it from gases forming on his stomach, I would not say gases; there would have to be causes for the gases to form on the stomach. It would be caused from an ulcerated stomach. A man could have a tumor or even a cancer in his stomach and not know it. As to whether a person could have an ulcer in his stomach and not know it until he had a hemorrhage, well, he would generally have some gastric disturbance before he had it, and possibly would not know it was an ulcer. A cancer is usually not painful until its last stages. A man might have a cancer in his stomach and then not know it until he got in the last stages. I expect it is true that there has been many a man die of cancer that never knew he had one. And wouldn't know it unless some doctor cut him open and found it—but he was sick beforehand. You see he could have other symptoms besides pain. One man might complain earlier than another of symptoms. As to whether the symptoms would develop so that you could determine, by looking at them, on some people quicker than on others, it depends on the color. The strength of that man's constitution would probably have something to do with it. If I were to operate on a patient and I could determine from that operation what was the matter with him, that he had a cancer or a tumor or any other trouble, it probably would not be necessary for me to perform an autopsy on that person after he died to determine what was the matter with him. That would depend on the extent of the operation. I am on the staff at Steiner's Clinic. I have been for a little more than eight years.

"Q. Now, Doctor, you stated a while ago that a man might have a cancer and not know it up until it reached

[fol. 123] its last stages. Is that what you stated a while ago?"

A. Yes, he might not know he had cancer."

I would say that if a man was working regularly every day and his appearance was of good health and he had perfect digestion and made no complaints and didn't appear from his looks to be a sick man, I would say that he didn't have a cancer, or any disease in its last stages.

* * * * * * * *

C. F. ENGLE, a witness for plaintiff in rebuttal, being duly sworn, testified as follows:

Direct examination.

By Mr. J. L. Smith:

I was sworn yesterday. I live in East Orange, New Jersey. I knew Harmon Yates during his lifetime. I knew him approximately three years before his death. I knew him very well—as a matter of fact, I lived with him. He lived in my apartment with me, for about three months. That was in the winter of 1929-30. That was when he first went to New York to live, to work. After his wife and children came up, I moved to the same apartment house that he did and our apartments adjoined each other. We lived that close together for approximately four months. As to whether I had any connection with the place where he was working, I employed him. He worked for me. I am still in charge of the business, and as I recall, he worked approximately two years for the Company that I represented. I was not in charge of the business, the place where he worked, at the time of his death. I was not at that time. He quit working at my place, as I recall, it was in 1930, some time possibly the latter part of 1930. I don't recall who he went with then; he was in the automobile or the tire business. As to how far I lived from him at the time of his death or at the time he went to the hospital, I moved to Connecticut, then, and that is approximately ninety miles from New York City, or from Long Island where he lived at that time. As to how often I saw him after I moved [fol. 124] to Connecticut. I saw him three times before he went to the hospital and most every day after he went to the hospital. I saw him the last time before he went to

the hospital, about a week prior to the time he went to the hospital. He visited me at that time in my home in Milford, Connecticut. He came up in his own car, he drove his family up. He and his family spent the week end. He spent the week end, Saturday and Sunday with me, and left there Monday morning. He left there early Monday morning to get back to his business. Gentlemen, he arrived at my home on Saturday afternoon and was as well as I ever saw him. He ate his meals regularly and there was nothing to indicate during his visit in my home that there was anything whatsoever the matter with him. He was in good spirits. He was jovial and always like he had always been. I took a trip out with him one Sunday afternoon and had quite a chat with him. He was not stout. I saw nothing to indicate that he was suffering from any disease at all. He was as well as I had always seen him, which was in pretty good health at all times.

* * * * * * *

[fol. 125] PLAINTIFF'S EXHIBIT NUMBER 2

(Copy)

Chelsea Tire Corporation, 784 Twelfth Ave., New York, N. Y.

Jamaica Branch, 87-82 166th St., Jamaica, N. Y.

June 23, 1932.

Mr. Herman Sulzer, Dist. Mgr., John Hancock Mutual Life Insurance Co., 90-04 161 Street, Jamaica, N. Y.

DEAR SIR:

In compliance with your request, I wish to advise that Mr. H. H. Yates was in our employ up to and including May 28th, 1932, at which time he entered the New York Hospital for diagnosis. He was up to this time performing his regular duties as salesman.

Yours very truly, Chelsea Tire Corporation, L. C. Rickmeyer, Manager.

[fol. 126] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 127] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the Supreme Court of the State of Georgia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8351-C)